Supreme Court, U.S.
FILED
MAY 4 1992
OFFICE OF THE CLERK

# 91-1773

No. 91-____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1991

IN RE MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC.
CONSOLIDATED LITIGATION

AARON FLECK, *et al.*,

*Petitioners*,

—against—

MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC., *et al.*,

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF DELAWARE

## PETITION FOR A WRIT OF CERTIORARI

DAVID F. DOBBINS
*Counsel of Record*
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 698-2500

SAUL, EWING, REMICK & SAUL
222 Delaware Avenue
P.O. Box 1266
Wilmington, Delaware 19899
(302) 654-1413

*Attorneys for Petitioners*
*Aaron Fleck, Ada Fleck,*
*Irene Mirman, Sandler*
*Associates, L.P. and*
*Daniel E. McCarthy*

## QUESTIONS PRESENTED

1. Can a state court constitutionally use its approval for nuisance value of a settlement of a state law suit in equity to destroy an action at law in federal court for substantial damages under the federal securities laws?

2. Is a state court constitutionally empowered to approve a class action settlement of an equity suit providing for the release of all claims for damages, including claims within the exclusive jurisdiction of the federal courts, at a time when the grant of an equitable remedy is impossible and the state court has denied the potential federal class members the opportunity to opt out?

## THE PARTIES TO THE PROCEEDINGS

The following were parties in the state court proceedings below: Petitioners Aaron Fleck, Ada Fleck, Irene Mirman, Sandler Associates, L.P., and Daniel E. McCarthy were plaintiffs below. Respondents Regina T. Monahan and Marshall Wolf were plaintiffs below. Respondents Mobile Communications Corporation of America, Inc., BellSouth Corporation, Mobile Telecommunication Technologies Corp., Salvatore J. Albano, Xavier W. Nady, John Palmer, C. Victor Raiser, II, Thomas G. Barksdale, R. Faser Triplett and E. Lee Walker were defendants below. BellSouth Corporation was a plaintiff in a declaratory judgment action below which was consolidated with the four shareholders' class actions below.

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions Presented ..... | i |
| The Parties to the Proceedings... | ii |
| Table of Contents ..... | iii |
| Appendices ..... | v |
| Table of Authorities ..... | vi |
| Reporting of Opinions in the Case | x |
| Statement of Jurisdiction ..... | xi |
| Constitutional Provisions and Statutes Involved in the Case. | xi |
| Statement of the Case ..... | 1 |
| The Class Members' Federal Securities Claim, Improperly Settled By the Delaware Chancery Court, Alleges that The Irrevocable Call Provided To BellSouth To Purchase MCCA At A Low Price Was Not Adequately Disclosed ..... | 7 |
| The Commencement of the Chancery Court Suits ..... | 21 |
| The Rulings Below ..... | 26 |
| Reasons For Granting The Writ ... | 31 |

I. THIS COURT SHOULD REAFFIRM THAT A STATE COURT IS NOT EMPOWERED TO APPROVE CLASS ACTION SETTLEMENTS PROVIDING FOR THE RELEASE OF EXCLUSIVE FEDERAL JURISDICTION CLAIMS WHERE CLASS MEMBERS ARE DENIED THE OPPORTUNITY TO OPT-OUT ... 31

II. DUE PROCESS REQUIRES THAT CLASS MEMBERS BE AFFORDED THE RIGHT TO OPT-OUT OF A CLASS ACTION SETTLEMENT WHERE AN AWARD OF DAMAGES IS THE ONLY AVAILABLE REMEDY AT THE TIME THE PROPOSED SETTLEMENT IS APPROVED ..... 41

A. This Case Raises an Important Question Unresolved by This Court's Decision in *Shutts* ..... 42

B. Class Members Have a Federal Due Process Right to Opt-Out of a Settlement Providing for the Release of Damages Claims When Equitable Relief is Impracticable ..... 48

CONCLUSION ..... 59

## APPENDICES

PAGE

MEMORANDUM OPINION OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY (January 7, 1991) ..... A 1

ORDER AND FINAL JUDGMENT OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY (February 6, 1991) ..... A 78

ORDER OF THE SUPREME COURT OF THE STATE OF DELAWARE (February 4, 1992) ..... A 87

MEMORANDUM AND ORDER OF THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY DENYING MOTION FOR PRELIMINARY INJUNCTION (March 29, 1989) ..... A 89

## TABLE OF AUTHORITIES


| | PAGE |
|---|---|
| CASES | |
| Abramson v. Pennwood Inv. Corp., 392 F.2d 759 (2d Cir. 1968) ..... | 36 |
| Bendectin Prod. Liab. Litig., In re, 749 F.2d 300 (6th Cir. 1984) ..... | 12n. |
| Colt Industries Shareholder Litig., In re, 77 N.Y.2d 185, 566 N.E.2d 1160 (1991) ..... | 4, 44, 48, 49, 50, 54, 57 |
| Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), mod. on other grounds, 890 F.2d 569 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989) .. | 46, 52 |
| Dennis Greenman Sec. Litig., In re, 829 F.2d 1539 (11th Cir. 1987) ..... | 47, 55 |
| Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044 (2d Cir. 1982) ..... | 32, 39 |
| General Motors Corp. Engine Interchange Litig., In re, 594 F.2d 1106 (7th Cir.), cert. denied, 444 U.S. 870 (1979) ..... | 33, 39 |

Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973) .... 14n., 17

Gimbel v. Signal Companies, 316 A.2d 599 (Del. Ch.), aff'd, 316 A.2d 619 (Del. Sup. 1974) ..... 46, 52

Green v. Occidental Petroleum Corp., 541 F.2d 1335 (9th Cir. 1976) ..... 12n.

Greenapple v. Detroit Edison Co., 618 F.2d 198 (2d Cir. 1980) ..... 14n.

Hansberry v. Lee, 311 U.S. 32 (1940) ..... 32

Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981) ..... 35

Lafer Amster & Co. v. Stone Container Corp., 690 F. Supp. 1356 (S.D.N.Y. 1988) ..... 17

Mobile Communications Corporation of America, Inc., Consolidated Litigation, In re, No. 69,1991 (Del. Sup. 1992) .... xi, 3

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) ..... 43

National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9 (2d Cir. 1981) ..... 32, 33, 34, 36, 37, 38, 39

Nottingham Partners v. Dana,
564 A.2d 1089 (Del. Sup. 1989) .. 35

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) ..... 2, 28, 29, 32, 42, 43, 44, 45, 48, 57

Real Estate Title & Settlement Serv. Antitrust Litig., In re,
869 F.2d 760 (3d Cir.), cert. denied, 493 U.S. 821 (1989) ..... 4, 50

SEC v. Falstaff Brewing Corp.,
629 F.2d 62 (D.C. Cir.), cert. denied, 449 U.S. 1012 (1980) .... 18

Simon v. Westinghouse Elec. Corp.,
73 F.R.D. 480 (E.D. Pa. 1977) ... 12n.

TBK Partners Ltd. v. Western Union Corp., 675 F.2d 456 (2d Cir. 1982) ..... 35

TSC Indus., Inc. v. Northway, Inc.,
426 U.S. 438 (1976) ..... 14n.

United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983)..... 10n.

Zimmerman v. Bell, 800 F.2d 386
(4th Cir. 1986) ..... 12n.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Const. amend. XIV, § 1 ..... xi

Securities Exchange Act of 1934

15 U.S.C. § 78j ..... xii

15 U.S.C. § 78n ..... xiii

15 U.S.C. § 78aa ..... xi, 34

28 U.S.C. § 1257 ..... xi

SEC Rule 10b-5 ..... xiii, 17

SEC Rule 14a-9 ..... xiv, 17

Fed. R. Civ. P. 23 ..... 30n.

Fed. R. Civ. P. 23(b)(1)(A) ..... 56n.

Fed. R. Civ. P. 23(b)(3) ..... 56n.

Delaware Chancery Court Rule 23 . 30n.

Delaware Chancery Court Rule 23(b)(1) ..... 30

Delaware Chancery Court Rule 23(b)(2) ..... 30

Del. Corp. Law § 251(d) ..... 16, 17

OTHER AUTHORITIES

H.B. Newberg, Newberg on Class Actions § 1.15 (Supp. Part I 1992) ..... 44

## REPORTING OF OPINIONS IN THE CASE

The per curiam affirmance by the Supreme Court of the State of Delaware, dated February 4, 1992, of the February 6, 1991, Order and Final Judgment of the Delaware Chancery Court for New Castle County is unpublished. Also unpublished are the Chancery Court's opinion dated January 7, 1991 approving the settlement and its March 29, 1989 decision denying a preliminary injunction. The texts of these opinions and orders are set out in the Appendix annexed hereto.[1] The April 4, 1989 refusal of the Delaware Supreme Court to accept an appeal of the denial of the preliminary injunction is reported at 561 A.2d 466 (1989).

---

[1] References to pages in the Appendix hereto are hereinafter cited as "A-___."

## STATEMENT OF JURISDICTION

Petitioners seek review of an Order of the Delaware Supreme Court in In re Mobile Communications Corporation of America, Inc., Consolidated Litigation, No. 69,1991, dated February 4, 1992. Jurisdiction is conferred on this Court under 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED IN THE CASE

U.S. Const. Amend. XIV, § 1:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

Securities Exchange Act of 1934, 15 U.S.C. § 78aa:

> The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of

> this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. . . .

Securities Exchange Act of 1934, Section 10, 15 U.S.C. § 78j:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Securities Exchange Act of 1934, Section 14a, 15 U.S.C. § 78n:

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 781 of this title.

Securities and Exchange Commission Rule 10b-5:

> Employment of Manipulative and Deceptive Devices.
>
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange:

(1) To employ any device, scheme, or artifice to defraud,

(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Securities and Exchange Commission Rule 14a-9:

False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with re-

> spect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.
>
> * * *

## STATEMENT OF THE CASE

The basic issues presented by this petition are simple: First, can the state courts of Delaware, which typically allow corporations incorporated in that state broad freedoms to eviscerate shareholder rights, ignore the due process protections of the Fourteenth Amendment and destroy substantive federal rights of such shareholders which can only be adjudicated by the federal courts? Second,

can a state court override the constitutional protections enunciated in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), and deny members of a federal class their rights to opt-out and pursue a different class action "wholly or predominantly for money judgments" at a time when equitable relief is no longer possible?

In August, 1989, four months after the Delaware Chancery Court denied an injunction against the acquisition by respondent BellSouth Corporation ("BellSouth") of respondent Mobile Communications Corporation of America ("MCCA"), former holders of a substantial number of MCCA shares filed a class action at law in the Delaware federal district court seeking hundreds of millions of dollars in damages. This action was filed under the federal securities law based upon the

misrepresentations and omissions in the proxy statement through which approval of the acquisition had been obtained. Contrary to the broad teaching of Shutts, the Delaware Chancery Court in this case held that in approving the nuisance value settlement of state court class action suits which had sought equitable relief, it could destroy the rights of the class members to prosecute a different class action exclusively for damages under the federal securities law in the federal courts. (A-1) This ruling was affirmed by the Delaware Supreme Court in the one-sentence order that is the subject of this petition. In re Mobile Communications Corporation of America, Inc., Consolidated Litigation, No. 69,1991. (A-87)

These rulings of the Delaware courts flatly conflict with the unanimous

decision of the New York Court of Appeals in In re Colt Industries Shareholder Litig., 77 N.Y.2d 185, 565 N.Y.S.2d 755, 566 N.E.2d 1160 (1991), a case analytically indistinguishable from this one. They also conflict with the rationale of the ruling in In re Real Estate Title & Settlement Antitrust Serv. Litig., 869 F.2d 760 (3d Cir.), cert. denied, 493 U.S. 821 (1989). In its per curiam affirmance, the Delaware Supreme Court did not even note the holdings to the contrary of the New York Court of Appeals or of the Third Circuit.

Certiorari should be granted to resolve this conflict between the highest state courts in the two most important jurisdictions dealing with corporate and shareholder rights, as well as the conflict with the Third Circuit, whose geographical jurisdiction includes

the Delaware state and federal courts. The proper delineation of this federal constitutional protection is important not only for securities litigation but for all class action litigation. Only this Court can make a definitive determination of this issue. We submit that this case presents an ideal opportunity for it to do so.

This case also presents the important question of whether the destruction of federal substantive rights should hinge on the happenstance that the state court first obtained jurisdiction over the members of a potential class. Here, the shareholders defrauded under the federal securities laws were powerless to prevent the Delaware state courts from exercising jurisdiction over them, and proceeding to destroy their federal

law claims, because BellSouth had instituted a preemptive action in the Chancery Court seeking a declaratory judgment that the merger could be consummated under Delaware law. The fact that BellSouth had filed the first action in state court, forcing the shareholders to follow into that court, should not provide the basis for the destruction of exclusive federal claims which were not and could not have been pleaded in state court.

In the Delaware Chancery Court, in opposing the motion to approve the settlement, and in the Delaware Supreme Court when appealing the approval, petitioners vigorously objected to the entire settlement, including those provisions which purported to release federal claims within the exclusive jurisdiction of the federal courts and

the settlement's denial of the class members' right to opt-out.

**The Class Members' Federal Securities Claim, Improperly Settled By The Delaware Chancery Court, Alleges That The Irrevocable Call Provided To BellSouth To Purchase MCCA At A Low Price Was Not Adequately Disclosed**

This case arose out of the acquisition via merger of MCCA, a cellular telephone company, by BellSouth. Petitioners herein were the owners of some 800,000 shares of MCCA, or 3-1/2% of all outstanding publicly-held shares. Immediately after BellSouth brought its declaratory judgment action in the Chancery Court, petitioners filed the first of several actions seeking to enjoin as illegal the proposed merger of MCCA and BellSouth. The settling plaintiffs, respondents Wolf and Monahan, who thereafter filed suits, owned only 3,050

shares of MCCA, or less than 1/100 of 1% of MCCA shares.[2]

The Merger Agreement between MCCA and BellSouth was finalized in February 1988. It provided that MCCA shareholders would receive BellSouth common stock for each outstanding share of MCCA stock.[3] At about the time of the Agreement, MCCA and BellSouth estimated that the total value of the consideration

---

[2] The settling plaintiffs' attorneys have been promised fees of almost $1,000,000 for a few days' work if the settlement is finally upheld. By virtue of their large share holdings in MCCA, the non-settling plaintiffs, unlike the settling plaintiffs, held a true economic stake in this litigation which was far greater than that of their attorneys.

[3] MCCA would also transfer certain of its assets to a new subsidiary, Mobile Telecommunication Technologies Corp. ("Mtel"), whose common stock would be spun-off and distributed to MCCA shareholders just before the merger.

to be received by MCCA shareholders was approximately $31 per share of MCCA stock surrendered. The merger price, set in February 1988, was low even in the summer of 1988 when the proxy statement seeking approval of the BellSouth merger was issued to the MCCA shareholders. As a result, this solicitation obtained the approval in August 1988 of only some 60% of the publicly-held shares of MCCA.

The disclosure issue in the federal action is whether or not the proxy statement disclosed the deal which MCCA's Board of Directors, respondents herein, had made with BellSouth that the approval of the Merger Agreement would, in effect, provide BellSouth with an irrevocable call to purchase MCCA at a below-market price regardless of the likely subsequent increases in the value of MCCA.

The proxy statement disclosed that following shareholder approval, consummation of the BellSouth merger would be subject to numerous state and federal regulatory approvals.[4] Because of these necessary approvals, the proxy statement informed MCCA shareholders that the merger would probably not close for at least a year following shareholder approval, which itself would occur some six months after the Agreement had been finalized and the merger price set.

The Merger Agreement contained important provisions which permitted MCCA to withdraw from the deal. Section 9.01 of the Agreement provided:

---

[4] These included BellSouth's need to obtain a waiver of the consent decree in the ongoing AT&T antitrust proceedings, United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983).

> This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time [merger consummation] before or after the approval by the shareholders of [MCCA]:
>
> * * *
>
> (f) By the Board of Directors of [MCCA], if it in the exercise of its good faith judgment, based upon the advice of counsel, determines that its fiduciary duties to the [MCCA] shareholders require that it: (i) not recommend approval of this Agreement by the Company's shareholders, or that it withdraw such recommendation, or (ii) take an action specified in Section 6.01(e)(ii). . . .

The referenced actions under § 6.01(e)(ii) included steps by MCCA to enter into an alternate transaction with a third party. If MCCA exercised its right to withdraw from the Agreement, it would have to pay a $25 million termination fee to BellSouth.

The proxy statement materially misled MCCA shareholders by failing to disclose the mutual understanding between MCCA and BellSouth that -- contrary to

the Merger Agreement's plain language as to "at any time... before or after" MCCA shareholder approval -- following that approval of the merger, § 9.01(f) of the Agreement did not permit MCCA to withdraw from the merger. Although BellSouth and MCCA later argued to the Chancery Court that this was the obvious substance of their transaction, their agreement that shareholder approval of the merger would extinguish forever MCCA's § 9.01(f)(i) right to "walk-away" from the merger was nowhere disclosed in the proxy statement. This undisclosed understanding meant that BellSouth could require MCCA to consummate the merger at the original low price scheme regardless of how long the regulatory approvals required and regardless of

how high the true value of MCCA rose during that admittedly long period.[5]

The Chancery Court considered that under Delaware law it was sufficient simply to attach the entire Merger Agreement to the proxy statement and have the proxy simply paraphrase certain portions of the Agreement without any explanation. However, this produced a proxy statement that was materially misleading under federal law. The adequacy of disclosure is judged from the perspective of a "reasonable investor," and not that of a skilled

---

[5] The Merger Agreement contained a provision whereby after April 10, 1989 -- some fourteen months after the merger price was set -- the price would be increased periodically by small amounts. However, these "bumps" were tiny and their calculation bore no relation to the current market price for MCCA's assets.

investment analyst or corporate lawyer.[6] Petitioners' federal claim presents the issue whether the average reasonable investor could have inferred, from reading § 9.01 of the Merger Agreement itself and the proxy statement's two cryptic paraphrases thereof, defendants' interpretation that MCCA would not be able to exercise the § 9.01(f)(i) walk-away right after shareholder approval.[7]

In order to prove the plausibility of their view of § 9.01(f)(i) of

---

6 See TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976); Greenapple v. Detroit Edison Co., 618 F.2d 198, 210 (2d Cir. 1980); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1297 (2d Cir. 1973).

7 Whether or not this is the correct contract interpretation was disputed. However, the question on this claim is not whether respondents' interpretation of the Merger Agreement is correct but whether that interpretation was fairly communicated in the proxy statement.

the Merger Agreement, counsel for respondents produced at the preliminary injunction hearing a colored chart which parsed the language of § 9.01. Each of the several termination provisions was color-coded to illustrate respondents' arguments as to whether it could apply "only before," or "only after" or "before or after" shareholder approval. This remarkable chart, a copy of which appears on the following page, was supposed to explain why respondents believed that the prefatory "before or after" language in § 9.01 should be ignored in interpreting the individual termination provisions.

No reasonable investor could ever be expected to parse § 9.01(f) or the proxy statement's paraphrases thereof with the same interpretative acumen of the corporate lawyers who came up with this very complicated chart. On the

# ARTICLE IX

# Termination

SECTION 9.01 *Termination and Abandonment.* This Agreement may be terminated and the Merger may be abandoned at any time prior to the Effective Time, before or after the approval by the shareholders of the Company:

(a) [redacted]

(b) By action of the Board of Directors of either Acquisition Sub or the Company, if (i) [redacted] or (ii) [redacted]

(c) By action of the Board of Directors of Acquisition Sub, if (i) [redacted] or (ii) [redacted]

(d) By action of the Board of Directors of the Company, if (i) [redacted] or (ii) [redacted]

(e) [redacted]

(f) By the Board of Directors of the Company, if it, in the exercise of its good faith judgment, based upon the advice of counsel, determines that its fiduciary duties to the Company's shareholders require that it: (i) [redacted] or (ii) [redacted] and BellSouth in either event shall have received payment in full of the fee referred to in Section 9.04.

In the event of any termination and abandonment pursuant to this Section 9.01, no party hereto (or any of its directors, officers, employees or agents or other representatives) shall have any liability or further obligation to any other party to this Agreement, except as provided in Section 10.05 and except that nothing herein will relieve any party from liability for any breach of this Agreement.

BEST AVAILABLE COPY

contrary, the average investor would consider that "before or after . . . at any time" meant precisely that, and not "only before." At the very least, this chart shows an ambiguity in § 9.01(f), which a federal jury -- and not a state trial judge -- must consider in assessing whether the disclosure made was sufficient under federal law.

The proxy statement was all the more misleading because § 9.01 of the Merger Agreement in fact tracked the language of Del. Corp. Law § 251(d), which states:

> Any agreement of merger or consolidation may contain a provision that at any time . . . the agreement may be terminated by the board of directors of any constituent corporation notwithstanding approval of the agreement by the stockholders. . . .

(emphasis added). Because the language of both the Agreement and the proxy statement closely paralleled the terms of

Del. Corp. Law § 251(d), it would be natural, at the least, for the MCCA shareholders to assume that the Agreement had secured the full statutory rights that its plain language appeared to incorporate. In such a situation, defendants had the affirmative duty to disclose expressly their later-revealed view of § 9.01(f)(i) "in order to make the statements made, in light of the circumstances under which they were made, not misleading." SEC Rule 10b-5. See SEC Rule 14a-9. In view of the deceptively close resemblance between the Delaware statute and § 9.01, it was simply not enough to attach the Agreement, paraphrase its misleading language and let the shareholders try to decipher its meaning. See Lafer Amster & Co. v. Stone Container Corp., 690 F. Supp. 1356, 1360-61 (S.D.N.Y. 1988). See also Gerstle, 478

F.2d at 1298. As the court stated in SEC v. Falstaff Brewing Corp., 629 F.2d 62 (D.C. Cir.), cert. denied, 449 U.S. 1012 (1980), "disclosure may not be buried in a mass of information that, when pieced together, might give the correct impression." 629 F.2d at 67 n.4.

Adequate disclosure of MCCA's right to walk away from the merger pursuant to § 9.01(f)(i) was critically material to the MCCA shareholders when voting on the proposed merger. A full understanding of this right was necessary to know the risk they would bear in the rising market for MCCA's assets in the admittedly lengthy pre-closing period. MCCA's shareholders had a need to know whether MCCA would be locked into a merger price which, by the time it closed, might (and did) prove to be grossly inadequate.

The rapidly rising values of cellular telecommunications companies was not a theoretical risk for MCCA shareholders, but a market reality. By early 1989, it was clear that MCCA was worth far more than the $31 per share, or the $75 "per pop"[8] price at which the investment community had valued the proposed merger. These figures paled in comparison to the true value of MCCA as reflected in prices then being paid for cellular properties comparable or inferior to MCCA's unique assets.

For example, in January 1989 British Telecommunications purchased a minority 22% interest in McCaw Cellular Communications, Inc. ("McCaw") at a price

---

[8] Cellular properties are typically valued on a "per pop" basis, referring to the population within the particular market and the price paid per population unit.

of roughly $140 "per pop," almost twice the "per pop" price BellSouth would pay for complete control of MCCA, whose cellular properties were far superior to those of McCaw. In March 1989, expert appraisals valued MCCA's assets as worth between $210 and $250 "per pop" -- compared to the $75 "per pop" merger price -- and its stock as worth $67 or as much as $76 per share -- compared to the $31 per share merger price. MCCA and BellSouth proffered no expert appraisals disputing these valuations.

It was not seriously contested in this case that in aggregate terms, the real value of MCCA as of early 1989 was well over $850 million more than the price BellSouth had agreed to pay a year earlier. This is the measure of damages that petitioners seek on their federal

claims now pending in the Delaware district court.

**The Commencement of the Chancery Court Suits**

The increasingly apparent inadequacy of the consideration MCCA shareholders would receive in the BellSouth merger led directly to this litigation. On February 16, 1989 counsel for petitioners demanded that MCCA's board exercise the company's right to withdraw from the Merger Agreement under § 9.01(f)(i) of the Agreement and pay the $25 million termination fee. In view of the fact that MCCA was then worth at the very least several hundred million dollars more than the value of the BellSouth deal, a termination of the merger was essential to preserve for MCCA's shareholders the value of their investments or

to enable MCCA to seek a fair price for its shares. In short, any deal approaching the then current market price -- or even no deal at all -- was far superior to the BellSouth transaction.

The very next day, BellSouth commenced a declaratory judgment action in the Chancery Court against MCCA and its directors seeking a declaration that MCCA had no power under § 9.01(f)(i) to terminate the Merger Agreement after shareholder approval of the merger. Remarkably, and in dereliction of their fiduciary duties to their shareholders, the MCCA directors joined in BellSouth's request for a declaration that they were powerless to take any action to maximize their shareholders' values.

BellSouth's suit forced the shareholder plaintiffs to follow into Chancery Court and petitioners filed the

first of the four class actions which sought to enjoin the merger. The class actions and the declaratory judgment suit were all consolidated. Within days after the denial of the preliminary injunction at the end of March, 1989, BellSouth made a secret pact with the settling plaintiffs and with the MCCA defendants to settle speedily the Chancery Court case. Acquisitive third parties had already begun to make inquiries to MCCA regarding an alternative merger, which respondents conceded would have been permissible under § 9.01(f)(ii). In order to close immediately and preclude any higher offer for MCCA, BellSouth agreed to make an immediate cash payment of $18.3 million not to the MCCA shareholders directly, but into Mtel, the MCCA spin-off which would be controlled and in large part

owned by MCCA management after the merger. The settlement provided for an additional $4.7 million payment into Mtel and $13 million in BellSouth shares to be paid to the MCCA shareholders if, and only if, the settlement was approved by the courts without any opt-out rights and all litigation in any court against the merger was terminated.

The settlement was at most worth approximately $36 million to the

MCCA shareholders.[9] This amount is nuisance value consideration for the release of damages claims that the BellSouth merger wrongly deprived MCCA shareholders of the uncontested $850 million or more by which the true value of their company exceeded the merger price.

Faced with the imminent closing of the merger, petitioners made an emergency application for a temporary stay of the merger pending appeal. The Chancery Court denied the stay, and the Delaware

---

[9] This estimate assumes that the $23 million in contributions from MCCA into Mtel would dollar for dollar increase the value of Mtel shares, and ignores the fact that many shareholders who had sold their right to receive Mtel shares when distributed would not receive any benefit from these payments into Mtel. The only parties assured a direct benefit from these payments to Mtel were the MCCA defendants, who after the merger would, and did, move over to become the management and major shareholders of Mtel.

Supreme Court refused an appeal on April 4, 1989. On that same day, MCCA and BellSouth quickly consummated the merger. This immediate closing was obviously designed to preclude a more favorable bid by a third party, which undisputably would have entitled MCCA to withdraw from the merger under § 9.01(f)(ii). Thereafter, because the equitable relief they had sought in state court was no longer possible, the objecting shareholders filed their federal securities action exclusively for damages in the Delaware federal court.

**The Rulings Below**

After the closing of the merger, petitioners demonstrated to the Chancery Court that the settlement was grossly inadequate. In the summer of 1989, absent class members with large

MCCA holdings who shared that judgment submitted affidavits opposing the settlement and supporting certification of petitioners as class representatives. These affiants and the non-settling plaintiffs together held over 4,945,000 MCCA shares, representing over 22% of the disinterested ownership of MCCA stock. No shareholders submitted any support for the settlement procured by BellSouth with the connivance of the small settling shareholders.

Overruling petitioners' objections, the Delaware Chancery Court approved the classwide settlement in its opinion dated January 7, 1991. (A-1) The Chancery Court erroneously characterized petitioners' disclosure claims as a mere challenge to the "propriety of director action in connection with a merger

transaction," dismissing the non-disclosure of BellSouth's irrevocable call as a narrow and technical matter. (A-68) It might have been, for purposes of Delaware law, but for petitioners' disclosure claims under the federal securities laws, it was no such thing.

After rejecting petitioners' objections to the inadequacy of the settlement in view of the strength of the claims being released, the Chancellor proceeded to hold that in this case he had the power to deny the federal constitutional right to opt-out. This purported power, according to him, derived from the following: (1) "plaintiff seeks equitable relief (injunction);" (2) "all members of the stockholder class are situated precisely similarly with respect to every issue of liability and damages (compare Phillips Petroleum Co. v.

Shutts, 472 U.S. 797 (1985));" and (3) "to litigate the matters separately would subject the defendant to the risk of different standards of conduct with respect to the same action." (A-68-69)

The Chancery Court ignored the point that the consummation of the merger almost two years earlier had rendered the class claims "wholly or predominantly for money judgments," and as such required the grant of opt-out rights under Shutts. The Court overlooked petitioners' basically undisputed showing that injunctive relief had been forever precluded by the closing of the merger in April 1989 and that the equitable remedy of rescission was virtually impossible by the time the settlement was considered in late 1990. The Chancellor could not and did not make any findings that equitable relief was still feasible, and noted, without any

elaboration or factual support, that the plaintiffs' "claims, if proven, will support the granting of equitable relief." (A-71) This was not only clearly erroneous, but under the undisputed facts, preposterous.

The Chancellor proceeded to approve the settlement under Delaware Chancery Court Rule 23(b)(1) and (b)(2),[10] denying class members any right to opt-out. The settlement contained a general release of all conceivable class claims, including federal claims which were not pleaded in the state court and which were within the exclusive jurisdiction of the federal courts. The Chancery Court refused to address petitioners' contention that class representatives in

---

[10] Delaware Chancery Court Rule 23 is substantially identical to Fed.R.Civ.P. 23.

a state court class action have no authority under the federal constitution to release claims over which a state court could not exercise jurisdiction. The Delaware Supreme Court's one-sentence order of affirmance termed the Chancery Court's opinion "well reasoned." (A-88)

## REASONS FOR GRANTING THE WRIT

### I

### THIS COURT SHOULD REAFFIRM THAT A STATE COURT IS NOT EMPOWERED TO APPROVE CLASS ACTION SETTLEMENTS PROVIDING FOR THE RELEASE OF EXCLUSIVE FEDERAL JURISDICTION CLAIMS WHERE CLASS MEMBERS ARE DENIED THE OPPORTUNITY TO OPT-OUT

Under the Due Process Clause, the powers of a class representative in a class action are limited by the representative nature of his authority, and the ability of the representative to bind class members is entirely predicated upon

the adequacy of that representation. Hansberry v. Lee, 311 U.S. 32, 42-43 (1940). See Shutts, 472 U.S. at 808. Under the Constitution, a class representative exceeds his authority when he settles a class action by releasing claims which he did not or could not assert in the lawsuit being settled. National Super Spuds, Inc. v. New York Mercantile Exchange, 660 F.2d 9, 18 (2d Cir. 1981). See also Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044 (2d Cir. 1982) (Secretary of Labor lacked authority to settle state common law class claims because statute authorizing his representation of the class was limited to federal statutory claims).

When a class representative acts beyond his authority in settling a class action, judicial approval of the settlement violates the due process

rights of class members. National Super Spuds, 660 F.2d at 18. Similarly, when a court acts beyond its jurisdiction to settle claims not within its power to adjudicate, any release in the settlement cannot include such claims. In In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1134 (7th Cir.), cert. denied, 444 U.S. 870 (1979), the Circuit Court reversed the approval of a classwide settlement which released state court claims over which the trial court had declined pendent jurisdiction, stating that the court "was without power to extinguish them."

In National Super Spuds, the Second Circuit reversed the district court's approval of a classwide settlement because the class representatives had agreed to release claims which they could not assert on behalf of the class.

Judge Friendly, writing for the Court, stated:

> If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either . . . . Under the circumstances here being considered, the named plaintiffs were authorized to represent other members of the class solely with respect to liquidated contracts. They were never authorized to represent such members with respect to unliquidated contracts. Having received authority to represent class members solely with respect to liquidated contracts, plaintiffs had no power to release any claims based on any other contracts.

660 F.2d at 18 (footnote omitted).

In the instant case, none of the class action complaints filed in the Chancery Court asserted federal claims, and none could have pleaded in state court petitioners' exclusive federal jurisdiction claims. 15 U.S.C. § 78aa.

Nonetheless, in violation of the shareholders' due process rights, the settlement approved by the Delaware Courts purported to release any and all such claims. The Chancery Court held that "it is within the in personam jurisdiction of a state court, in an appropriate case to authorize the release of all claims, including exclusively federal claims. The efficient operation of our coordinated federal system requires such a result." (A-74) This was plainly erroneous because mere considerations of judicial "efficiency" are insufficient to override due process rights.

In support of this holding, the Delaware Chancery Court cited Nottingham Partners v. Dana, 564 A.2d 1089 (Del. Sup. 1989); TBK Partners Ltd. v. Western Union Corp., 675 F.2d 456 (2d Cir. 1982); Kincade v. General Tire & Rubber Co., 635

F.2d 501 (5th Cir. 1981) and Abramson v. Pennwood Inv. Corp., 392 F.2d 759 (2d Cir. 1968). These cases are inapposite, however, because they all involved suits brought primarily as derivative actions and not shareholder class actions.

In National Super Spuds, Judge Friendly specifically distinguished class action settlements from settlements of derivative claims with regard to releases purporting to bind absent parties. He explained that in any settlement of a derivative suit, which is brought on behalf of the corporation, the legal entity whose unpleaded claims are being released is in fact a party to the settlement. 660 F.2d at 18-19. The corporation, of course, has the power to release any of its own claims even if "the state court could not adjudicate the federal claim" being released. Abramson v. Pennwood

Inv. Corp., 392 F.2d at 762. In a class action, in contrast, purported class representatives have no power "to release claims with respect to which none of them was authorized to represent members of the class." National Super Spuds, 660 F.2d at 19.

The instant class action is fundamentally different from the derivative suit cases cited by the Chancery Court in that the shareholders here are asserting their own direct right to damages. The only connection of absent shareholders to the state court litigation is through the implied agency relationship with the class representative to litigate claims which could be brought in state court. The purported class representative's mere presence in state court affords no basis to imply authority to release class members' exclusive federal

jurisdiction claims. The state court class representative can only contract to settle his own exclusive federal claims and not those of the class.

The settlement approved below purports to release claims asserted not in Chancery Court, some of which are within the exclusive jurisdiction of the federal courts. Just as a judgment after trial in the state court class action could not extinguish federal claims because they could not have been brought in state court, National Super Spuds shows that if a claim could not have been brought in the underlying complaint then a representative does not have authority to settle that claim for absent class members. 660 F.2d at 18.

This Court has never addressed the question whether a state court can constitutionally approve a settlement and

release proposed in a state class action lawsuit, not a derivative suit, and which purports to bar the litigation of exclusive federal jurisdiction claims in federal court. Nonetheless, the cases cited above, National Super Spuds, Dunlop v. Pan American World Airways, Inc. and In re General Motors Engine Interchange Litigation are closely analogous and show that a court lacks the power to approve a class action settlement which releases claims which could not be brought in that court. This Court should now make this rule clear by the grant of this petition.

Respondents have suggested previously in this case that this constitutional violation in the settlement can be redressed at some point in the future by the federal district court because it might reject the release of class claims approved by the Delaware courts. That

argument is specious. There is error of constitutional magnitude in the approval of this settlement and it is for this Court to correct it as promptly as possible. The possible future availability of a collateral challenge to the settlement cannot justify this Court's implicit sanction of plain constitutional error. This is particularly so because the federal district court has effectively stayed the claims before it since they were filed almost three years ago. Collateral remedies here are obviously not adequate. This petition should be granted.

II

## DUE PROCESS REQUIRES THAT CLASS MEMBERS BE AFFORDED THE RIGHT TO OPT-OUT OF A CLASS ACTION SETTLEMENT WHERE AN AWARD OF DAMAGES IS THE ONLY AVAILABLE REMEDY AT THE TIME THE PROPOSED SETTLEMENT IS APPROVED

As a result of the ruling below, decisions of the courts of last resort of New York and Delaware are now in direct conflict over the issue of when the Due Process Clause mandates the grant of the right to opt-out in class action litigation. The ruling below also conflicts with a significant decision of the Third Circuit on this issue. This Court should correct the error of the Delaware Courts and declare that when the grant of the equitable relief initially sought by a class is rendered impracticable by events, a settlement thereafter approved which denies the right to opt-out unconstitutionally impairs a class member's

property interests in his chose of action.

## A. This Case Raises an Important Question Unresolved by This Court's Decision in *Shutts*

In Phillips Petroleum v. Shutts, this Court set forth the due process limitations on a state court's power to bind class members who are represented only nominally:

> If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel.
>
> . . .
>
> Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court.

Shutts, 472 U.S. at 811-12 (footnote omitted).

Shutts held that the right to opt-out and the other due process rights enumerated cannot be denied in a judgment which would bind absent or objecting plaintiffs as to claims "wholly or predominantly for money judgments." 472 U.S. at 811 n.3. Due process requires the opportunity to opt-out to protect against an improper forfeiture of a class member's rights to own and to control his or her chose in action, which are a "constitutionally recognized property interest." 472 U.S. at 807; Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). If the class member were unable to opt-out, an adverse judgment against the entire class "may extinguish the chose in action forever

through res judicata." Shutts, 472 U.S. at 807.

This petition does not seek a ruling that due process requires an opt-out in class actions which demand predominantly equitable relief but also seek money damages. Petitioners acknowledge that where a class action continues to seek predominantly or exclusively equitable relief, permitting class members to opt-out could create "the possibility of conflicting judgments from different jurisdictions which would subject the defendants to varying and possibly inconsistent obligations." Colt Industries, 77 N.Y.2d at 195, 566 N.E.2d at 1165-66. See H.B. Newberg, Newberg on Class Actions § 1.15 at 12 (Supp. Part I 1992) (where injunctive relief is "primary" remedy sought, right to opt-out may be limited.)

This petition presents different issues because at the time the Delaware Chancery Court considered and approved the settlement, the case, although commenced as a suit for an injunction, had become one not only "predominantly," but exclusively, for a money judgment. As such, petitioners ask this Court to explicate when and on what basis courts should determine whether an action is "predominantly" for equitable relief or for money damages. Shutts did not decide whether this should be assessed (a) only on the basis of the relief sought in the original class action complaint or (b) based on the relief available at the time the court considers whether to approve a proposed classwide settlement. Nor did Shutts resolve whether this determination should be based on the conceivable availability

of equitable relief or on a facts and circumstance appraisal of the feasibility of that relief.

Thus, this Court has not addressed the question squarely presented by this petition: whether an opt-out must be granted to class members in an action which initially sought predominantly injunctive relief but in which damages have subsequently become the only feasible remedy. The fact pattern of this case arises frequently when a class action is brought to enjoin a corporate merger. Should the injunction be denied, the merger will take place, and rescission will as a practical matter become virtually "impossible." Gimbel v. Signal Companies, 316 A.2d 599, 603 (Del. Ch.), aff'd, 316 A.2d 619 (Del. Sup. 1974). As the Second Circuit stated in Consolidated Gold Fields PLC v. Minorco, S.A., 871

F.2d 252, 261 (2d Cir.), mod. on other grounds, 890 F.2d 569 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989):

> "once the tender offer has been consummated it becomes difficult, and sometimes virtually impossible, for a court to `unscramble the eggs.'" Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973): see also Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 947 (2d Cir. 1969).

Once class members are left with only the remedy of damages, the impossibility of equitable relief removes the danger that a defendant could be faced with inconsistent equitable directives from different jurisdictions. See In re Dennis Greenman Sec. Litig., 829 F.2d 1539, 1545 (11th Cir. 1987). Should the right to opt-out be denied class members under such circumstances, a class member's property

interests in his chose in action, including his interest in controlling his own litigation, would be forfeited. This petition presents the important unresolved question of whether denying opt-out rights at that stage of the proceedings can serve any legitimate state purpose sufficient to defeat the class members' due process rights.

**B. Class Members Have a Federal Due Process Right to Opt-Out of a Settlement Providing for the Release of Damages Claims When Equitable Relief is Impracticable**

In Colt Industries, New York's highest court considered the question of when and how a class action should be determined to be "predominantly" for injunctive relief or for money damages for purposes of the opt-out rights required under Shutts. In Colt Industries the named plaintiffs and defendants reached a

settlement in principle and the merger was consummated shortly thereafter but prior to the state court hearing on the fairness of the settlement. As in the instant case, the trial court denied a class member's request to opt-out and approved the settlement which included a general release covering all claims for damages.

The New York Court of Appeals reversed. The court discounted the fact that the complaints had initially sought equitable relief. 77 N.Y.2d at 196, 566 N.E. 2d at 1166. Due process requires the trial court to re-evaluate the need for an opt-out as of the time approval of the settlement is sought and to consider the nature of the settlement. Id. The settlement in Colt Industries granted

some equitable relief but improperly "exacted as a price for that relief a concession that the class members could not pursue damage claims based on the merger. 77 N.Y.2d at 197, 566 N.E.2d at 1167. Moreover,

> once the parties presented the court with a settlement that accorded equitable relief and in turn required the class members to give up all claims in damages, the nature of the adjudication changed dramatically. We conclude that the trial court erred when it approved a settlement of this kind without affording Merritt the due process protections outlined in Shutts.

77 N.Y.2d at 199, 566 N.E.2d at 1168.

The Delaware Supreme Court's ruling in the instant case is squarely at odds with the New York Court of Appeals' decision in Colt Industries. The Delaware Courts' decisions also conflict with the rationale of In re Real Estate Title & Settlement Antitrust Serv. Litig., which held that the Due Process Clause

prohibits enjoining members of a mandatory class from collaterally attacking the adequacy of class representation.

The Delaware Courts held that they could constitutionally destroy these opt-out rights because the class complaints had initially sought equitable relief and because claims to be released under the settlement "will support the granting of equitable relief." (A-71) However, there was no issue in this case as to whether the remedy of rescission, or any other equitable relief, was at all feasible at the time the settlement was assessed in late 1990 or approved in early 1991, almost two years after consummation of the merger. Rescission, while perhaps theoretically available, was never sought by any plaintiff and was "virtually impossible" by the time of the

settlement hearing.[11] Consolidated Gold Fields; Gimbel v. Signal Companies. The shareholders by then could only recover damages.

Respondents did not argue or attempt to demonstrate that any equitable remedy was still practicable at the time the settlement was considered, and the

---

[11] In fact, the obstacles to rescinding the MCCA-BellSouth merger months (much less years) after its consummation were simply insurmountable: (1) the transaction was highly complex, requiring numerous federal regulatory approvals as well as federal judicial waivers; (2) by the time of the first settlement hearing, the two companies' assets and affairs had become inextricably commingled and (3) the merger involved the creation of a distinct and separately held entity, Mtel. Even if it were possible to "unscramble the eggs" and undo this merger, there would be no way to insure that the benefits of rescission would redound to former MCCA shareholders, many of whom could be presumed to have sold the BellSouth and Mtel shares they received in 1989 when the merger was consummated.

Chancery Court made no finding whatsoever on this issue. Absent an affirmative finding that equitable relief was still a practical possibility, there can be no danger to a defendant of conflicting or inconsistent judgments and therefore no legitimate purpose sufficient to deprive a shareholder of his due process rights in his chose of action. The Chancery Court ruled that because it considered that the claims released, as pleaded, could theoretically support a grant of equitable relief, it could destroy class claims under federal law in the face of the indisputable fact that equitable relief was at that time no longer available. This ruling has about as much basis in reality as the pleading fictions underlying the old English common law action of ejectment.

The argument that an opt-out is mandatory here is even stronger than in Colt Industries, which required an opt-out even though rescission, which the class complaint in that case had specifically requested, could not be ruled out as a possibility. 77 N.Y.2d at 191, 566 N.E.2d at 1163. In contrast, the settlement here accords no equitable relief and the remedy of rescission of the merger was impossible. Moreover, rescission here was not only impossible, but had not been requested by any plaintiff at any time.

When a class action seeks damages rather than equitable relief, providing the opportunity to opt-out creates no prospect for conflicting judgments which might otherwise justify limiting a shareholders' constitutional right to opt-out. This is because "inconsistent

standards for future conduct are not created because a defendant might be found liable [in damages] to some plaintiffs and not to others." In re Dennis Greenman Sec. Litig., 829 at 1545.[12] Indeed, the right to opt-out, by its very nature, contemplates the likelihood of different determinations of liability and different damages awards. Any money judgment obtained in an action brought by a plaintiff who had exercised his right to opt-out can be satisfied without impairing the enforcement of money judgments in different amounts (per share) obtained

---

12 See In re Bendectin Prod. Liab. Litig., 749 F.2d 300, 305 (6th Cir. 1984); Zimmerman v. Bell, 800 F.2d 386, 389 (4th Cir. 1986); Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 n.10 (9th Cir. 1976); Simon v. Westinghouse Elec. Corp., 73 F.R.D. 480, 486 (E.D. Pa. 1977).

earlier by those who did not opt-out.[13] Accordingly, the Chancery Court had no basis in law or logic for its statement that an opt-out must be denied because different money judgments would imply "different standards of conduct with respect to the same action." (A-72)

Once these class actions failed to achieve their initial injunctive goal and, by virtue of the closing of the merger, were necessarily transformed into an action in which the only feasible remedy was damages, the only rationale for denying opt-out rights became wholly inapplicable. Since there was no prospect of conflicting equitable judgments in this case, the Chancery Court's denial of the

---

[13] Indeed, to hold otherwise would render Fed.R.Civ.P. 23(b)(3) superfluous because all class actions for damages would then be certified under Fed.R.Civ.P. 23(b)(1)(A) without an opt-out.

opportunity to opt-out served no legitimate purpose sufficient to destroy the class members' constitutional property interests in their choses of action.[14] Under Shutts, this was constitutionally impermissible.

Colt Industries correctly held that the question whether a class action seeks "predominantly" money damages, for purposes of the Shutts rights required by the Due Process Clause, must be assessed

---

[14] Although the Chancery Court suggested that the interests of judicial economy and uniformity could be considered, Colt Industries correctly explained that "the interest in obtaining a single binding judgment ... [which] precludes additional litigation is not sufficiently compelling for us to ignore the jurisdictional and procedural immpediments to binding out-of-State class members to class settlements such as this one without giving them the opportunity to exclude themselves from the class." 77 N.Y.2d at 198, 566 N.E.2d at 1167.

in light of the nature of the relief reasonably available at the time a proposed settlement is presented to the court. This Court should affirm this rule and resolve this conflict between the decisions of the Delaware Courts and those of the New York Court of Appeals and of the Third Circuit. This Court should grant the petition and make clear that when equitable relief is virtually impossible and the settlement releases all damages claims, the Due Process Clause mandates that an opportunity to opt-out be afforded to all class members.

## CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

David F. Dobbins
Counsel of Record
for Petitioners

PATTERSON, BELKNAP, WEBB
& TYLER
30 Rockefeller Plaza
New York, New York 10112
(212) 698-2500

SAUL, EWING, REMICK & SAUL
222 Delaware Avenue
P.O. Box 1266
Wilmington, Delaware 19899
(302) 654-1413

# APPENDIX

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

| | | |
|---|---|---|
| IN RE MOBILE COM- | ) | Civil Action |
| MUNICATIONS CORPO- | ) | Nos. 10627, |
| RATION OF AMERICA, | ) | 10638, 10644, |
| INC., CONSOLIDATED | ) | 10656, 10697 |
| LITIGATION | ) | |

MEMORANDUM OPINION

Date Submitted: January 18, 1990
Date Decided: January 7, 1991

Joseph A. Rosenthal, Esquire, of MORRIS, ROSENTHAL, MONHAIT & GROSS, P. A., Wilmington, Delaware; Richard Bemporad, Esquire, of LOWEY, DANNENBERG, BEMPORAD, BRACHTLE & SELINGER, P.C., New York, New York; William Klein, II, Esquire, of TENZER, GREENBLATT, FALLON & KAPLAN, New York, New York; Attorneys for Plaintiffs Regina T. Monahan and Marshall Wolf.

Jeffrey S. Goddess, Esquire, of SAUL, EWING, REMICK & SAUL, Wilmington, Delaware; David F. Dobbins, Esquire, Richard Savage, Esquire, Blair Axel, Esquire and Frederick S. Mandler, Esquire, of PATTERSON, BELKNAP, WEBB & TYLER, New York, New York; Attorneys for

the Non-settling Plaintiffs, Sandler Associates, L.P., McCarthy, Fleck, Fleck and Mirman.

Thomas Reed Hunt, Jr., Esquire, of MORRIS, NICHOLS, ARSHT & TUNNELL, Wilmington, Delaware; Warren R. Stern, Esquire and Andrew C. Houston, Esquire, of WACHTELL, LIPTON, ROSEN & KATZ, New York, New York; Attorneys for Defendant BellSouth Corporation.

Jesse A. Finkelstein, Esquire, of RICHARDS, LAYTON & FINGER, Wilmington, Delaware; Thomas F. Cullen, Jr., Esquire, Kevin D. McDonald, Esquire and Deena B. Jenab, Esquire, of JONES, DAY, REAVIS & POGUE, Washington, D.C.; Attorneys for Mobile Communications Corporation of America, Inc.

ALLEN, Chancellor

Pending is a motion under Rule 23(e) to approve a proposed settlement of this stockholder class action litigation and to release related class claims currently pending in the United States District Court for the District of Delaware.

The lawsuits at issue arose out of a merger, initiated in early 1988 and completed in 1989, in which all of the stock of Mobile Communications Corporation of America ("MCCA") was acquired by a wholly-owned subsidiary of BellSouth Corporation ("BellSouth") in exchange for BellSouth stock worth approximately $710 million. Plaintiffs have alleged, among other things, that, in light of takeover speculation in cellular telephone stocks that was occurring at the time of the closing of the merger, the price paid by BellSouth was woefully inadequate and that MCCA's board of directors breached

its fiduciary duties to the MCCA shareholders in failing to exercise a right that plaintiffs argue MCCA had under the merger agreement with BellSouth to terminate that agreement. Plaintiffs also assert (1) that, in soliciting shareholder approval of the BellSouth merger, MCCA and the individual defendants who serve as its directors, breached duties of candor in allegedly failing adequately to explain the meaning and ramifications of the provision of the merger agreement dealing with MCCA's right to terminate the merger agreement and (2) that the sale to BellSouth represented the culmination of a scheme to sell the MCCA assets to BellSouth at a bargain price. This latter claim is recast as a RICO

claim[1] in federal litigation subsequently filed by certain of the plaintiffs in these cases.

On March 16, 1989, plaintiffs moved for a preliminary injunction against the closing of the proposed merger, asserting that the board of MCCA had, under the merger agreement, the legal right and, under fiduciary duty concepts, the duty, to terminate the merger agreement. This application was premised on plaintiffs' belief that the market value of companies in the cellular phone business (MCCA's principal business) had risen very appreciably since the February 19, 1988 date of the execution of the BellSouth merger agreement and that a much higher price could be

---

1 The Racketeering Influenced Corrupt Organizations Act, is codified at 18 U.S.C. §§ 1962(a)-(d).

realized from the sale of the company if terms of the merger could be negotiated in the then-current market. The court declined to issue such an injunction, concluding, albeit preliminarily, that the merger agreement did not, in the circumstances, afford to MCCA a right to terminate the agreement and concluding also that the proxy materials accurately disclosed the narrow and technical matter that had come to plaintiffs to appear critically important. In re Mobile Communications Corp. Cons. Litig., Del. Ch., Cons. No. 10627, Allen, C. (Mar. 29, 1989).

On a motion for interlocutory appeal of the denial of the request to prevent the effectuation of the merger, the court, having seen by that time a large number of applications to enjoin

transactions affecting corporate control,[2] candidly stated an evaluation of the strengths of the central claims asserted in these cases:

> Frankly, I found that the case presented last week was one of the weakest cases legally for the issuance of a preliminary injunction that I have ever encountered in the court.

* * * *

---

2 See, e.g., AC Acquisition Corp. v. Anderson, Clayton & Co., Del. Ch., 519 A.2d 103 (1986) (granting injunction); City Capital Assocs. Ltd. v. Interco, Inc., Del. Ch., 551 A.2d 787 (1988) (same); USI, Inc. v. Walbro Corp., Del. Ch., No. 9323 (Oct. 6, 1987) (same); Solash v. Telex Corp., Del. Ch., No. 9518, Allen, C. (Jan. 19, 1988) (denying injunction); TW Services, Inc. v. SWT Acquisition Corp., Del. Ch., No. 10427 (Mar. 2, 1989) (same); In re Fort Howard Corp. Shareholders Litig., Del. Ch., No. 9991, Allen, C. (Aug. 8, 1988) (same); In re J. P. Stevens & Co., Inc. Shareholders Litig., Del. Ch., 542 A.2d 770 (1988) (same).

> Well, with respect to that aspect of the claim, the probability of success, I have already been as candid as I can be, and more candid than the plaintiffs would care for me to be in telling you that I don't think there is much to this case legally once you get past the practical fact that the plaintiffs may feel that there is more money out there if somebody would just be free to go and look for it.

Transcript of Apr. 3, 1989, at 27, 29-30. The Delaware Supreme Court denied interlocutory appeal of the denial of the application for preliminary injunction.

Shortly before the preliminary injunction hearing, on March 24, 1989, the parties opened settlement negotiations. At that time all of the plaintiffs participated in the discussions. After the preliminary injunction hearing, on March 30, settlement negotiations recommenced. Only the Wolf and Monahan plaintiffs chose to participate. On

April 1, settling plaintiffs reached an agreement in principle on settlement although the details were not finalized until June 6. The Delaware Supreme Court denied certification of an appeal on April 4. The merger was accomplished that same day. Discovery, which began in early March, continued into January of 1990. This settlement was presented for this court's approval on January 18, 1990.

In brief, the proposed settlement offers in the range of $35 million in cash and BellSouth stock in exchange for the release of all claims, state and federal, that might arise out of the transactions leading up to and including the Bellsouth acquisition of MCCA. The settlement also contemplates the payment of $995,000 in legal fees to plaintiffs' counsel.

Settling plaintiffs warmly endorse this settlement as an advantageous deal by which MCCA shareholders as of the time of the merger receive substantial benefit in exchange for the release of essential weak claims. The non-settling plaintiffs (sometimes called "objectors") object to the settlement. They claim, inter alia, that damage in excess of two billion dollars might be achieved here and that the proffered settlement is wholly inadequate.

I.

The following is a summary of the facts of this case, as they appear in the record.

The parties

Regina T. Monahan and Marshall Wolf (collectively, the "settling plaintiffs" or the settlors") were holders of MCCA common stock at the time of the BellSouth merger. Monahan owned only 50 shares of MCCA stock; Wolf owned 3,000 shares. Aaron Fleck, Sandler Associates, L.P., and Daniel McCarthey (collectively, the "non-settling plaintiffs" or the "objectors") together, owned over 800,000 shares of common stock at the time of the merger.[3] The non-settling plaintiffs object to the proposed settlement as inadequate and thus unfair.

Prior to its merger with a BellSouth subsidiary, MCCA was a Delaware corporation with its executive offices in

---

3 At the time of the merger, there were 12,002,230 shares of MCCA Class A common stock and 11,599,164 shares of Class B common stock outstanding.

Jackson, Mississippi. MCCA provided mobile telecommunications services in more than 100 cities throughout 34 states, the District of Columbia, and the U.S. Virgin Islands.

Mobile Telecommunications Technology Corp. ("Mtel") is a Delaware corporation that was incorporated on October 21, 1988, to succeed to the business and assets of COM/NAV Marine, Inc. ("COM/NAV"), then a wholly-owned subsidiary of MCCA. On April 4, 1989, in contemplation of the merger effectuated that day, the stock of Mtel was distributed to the MCCA stockholders on a share-for-share basis.

BellSouth is a holding company for various subsidiaries, including South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company

which principally provide tariff telecommunications services and products to customers in several states. BLS Acquisition Corporation I, Inc., is a Delaware corporation and a wholly-owned subsidiary of BellSouth that was formed to facilitate the acquisition of MCCA.

Salvatore J. Albano, Thomas G. Barksdale, Xavier W. Nady, John N. Palmer,[4] C. Victor Raiser, R. Faser Triplett, and E. Lee Walker were directors of MCCA during the relevant period. John Hamon is also named as a defendant in the Fleck and Sandler lawsuits, but it is unclear from the record whether he was a director at all relevant times.

---

4 The Fleck and Sandler lawsuits name Nelson Palmer as defendant I assume this is a reference to John N. Palmer.

Background of the merger agreement

MCCA was a company built from virtually nothing into a large cellular communications company, largely by its founder and chief executive officer, John Palmer. Palmer founded the company in 1965. Over the period 1975-1989, MCCA enjoyed explosive growth but had huge needs for capital.

The business relationship between BellSouth and MCCA predated the merger agreement that underlies this case. In February 1986, MCCA and BellSouth executed a Stock Purchase Agreement, pursuant to which BellSouth agreed to buy and MCCA agreed to sell MCCA common stock (class A and B), representing approximately 15% of the voting power of MCCA's then outstanding common shares. In return, MCCA received an equity infusion of over $40 million.

Also on that date, BellSouth contracted to acquire a 50% interest in MCCA's subsidiary that held its cellular radio telephone operations.[5] Pursuant to this acquisition, BellSouth undertook to finance any further cellular acquisitions by MCCA and to assume 99% of the losses from cellular operations until January 1, 1990, or until the capital accounts of MCCA and BellSouth became equal. BellSouth also acquired an option, exercisable in the event any third party acquired 50% of the voting power of MCCA without board approval, to buy the other 50% interest in the cellular telephone business. In addition, BellSouth was granted a right, exercisable in the event

---

5 BellSouth's purchase of 50% interest in MCCA's cellular operations was completed on December 31, 1986.

of an unsolicited offer for the acquisition of 12.5% or more of the voting power of MCCA not approved by a majority of disinterested directors, to acquire sufficient additional MCCA shares to increase its voting power to 30%.

The following year (1987), MCCA and BellSouth held preliminary discussions concerning a possible business combination; no agreement, however, was reached at that time.

On January 14, 1988, BellSouth delivered to MCCA a written offer to acquire MCCA's paging and cellular operations in a merger in which each share of common stock of MCCA would be exchanged for $24 of common stock of BellSouth. On January 25, 1988, MCCA issued a press release disclosing the BellSouth proposal. Subsequently, MCCA received several inquiries from other potential

bidders. On January 29, 1988, when BellSouth was advised by MCCA that it would be necessary for MCCA to explore expressions of interest from other parties, BellSouth withdrew its proposal, indicating that it would not continue negotiations under such circumstances.

Nevertheless, in early February 1988, MCCA invited all interested parties to participate in an "auction" of the company and set a deadline of February 19, 1988, for the submission of acquisition proposals. During the preceding weeks, MCCA's investment bankers, Prudential Bache, had been testing potential values for the company by discussing the potential sale of MCCA with possible purchasers. On February 19, BellSouth delivered a bid to purchase MCCA's paging and cellular operations for $28.75 of BellSouth common stock per share of MCCA

common stock. The board received proposals from others as well, including McCaw Cellular Communications and Southwestern Bell.[6] The MCCA board met on that date to consider all offers received by the company. The board concluded that the BellSouth proposal provided the greatest value to MCCA's shareholders and that it was unlikely that a proposal at a higher price would be received in the then foreseeable future. A definitive merger agreement between the parties was executed the same day, and the 1986 Stock Purchase Agreement between MCCA and BellSouth was amended concurrently.

---

6 The Southwestern Bell offer was only for MCCA's paging assets. Southwestern Bell was in the process of locating a partner to purchase MCCA's cellular assets.

The merger agreement was contingent upon the receipt of certain regulatory approvals, as well as the receipt of a waiver from the United States District Court for the District of Columbia under a consent decree settling antitrust litigation against the former Bell System of which BellSouth had been a part. On August 24, 1988, the MCCA stockholders voted to approve the merger.

On January 19, 1989, as MCCA and BellSouth awaited the requisite approvals to consummate the merger, British Telecommunications agreed to purchase a 22% interest in McCaw Cellular Communications for $1.5 billion. Applying industry standards (value based on population covered by licenses), this transaction implied that a substantially higher value for MCCA could be realized in January,

1989, than had been negotiated in February, 1988, with BellSouth. The publicity surrounding the unexpectedly high price paid by British Telecommunications ignited a wave of speculation in the stocks of cellular companies, including MCCA. See In an Unusual Twist, Arbitragers Are Hoping For a Disconnection in BellSouth-Mobile Deal, Wall St. J., Feb. 15, 1989, col. C2.

On February 16, 1989, counsel for the shareholder plaintiffs demanded to the MCCA board that it terminate the merger agreement pursuant to Section 9.01(f)(i) of that agreement and pay the termination fee required by Section 9.04 in order to enable the company to seek a higher price from another party. The following day, BellSouth filed suit in this court seeking a declaration that the MCCA board had no power to terminate the

merger agreement under that section. Defendant MCCA and its directors responded by joining in the BellSouth request for declaratory judgment.

On February 21, 1989, the first of four purported class actions on behalf of MCCA shareholders was commenced. These actions were consolidated for expedited discovery. On March 28, following expedited discovery, plaintiffs sought a preliminary injunction against the MCCA-BellSouth merger pending final determination of the matters raised by the complaints.

Much of the argument at the hearing on the request for a preliminary injunction focused on the interpretation of Section 9.01(f)(i) of the merger agreement. Plaintiffs asserted that under that section, the MCCA board was

entitled to terminate the merger agreement, and that in failing to do so, the board was breaching its fiduciary duties. Plaintiffs asserted in the alternative that defendants' disclosure of the transaction in the proxy statement distributed to the MCCA stockholders in connection with their approval of the merger was inadequate and that the transaction represented a breach of so-called "Revlon duties." Plaintiffs' motion for injunctive relief was denied by this court in its seven-page order of March 29, 1989.[7]

The parties had opened settlement discussions on March 24 with all plaintiffs participating. These efforts

---

7 Non-settling plaintiffs' motion for an injunction pending appeal was denied by this court on April 3. The following day the Delaware Supreme Court denied non-settling plaintiffs' motion for certification of an appeal.

were, of course, unavailing. Following the court's ruling on the application for preliminary injunction, those conversations recommenced on March 30. This time the non-settling plaintiffs refused to participate. The MCCA defendants were not present at the New York settlement negotiations but were apprised of the discussions.

The settlement agreement

On April 1, following the ruling on the application for injunction pending appeal, settling plaintiffs and the defendants reached an agreement in principle to settle the action. Documents reflecting the agreement in principle were drafted and revised until

June 6,[8] when the Stipulation of Settlement was executed by MCCA, BellSouth, and the settling plaintiffs. This agreement would release defendants from all claims that might be asserted in connection with the negotiation or effectuation of the merger. In consideration for this release of all claims the agreement provides, inter alia, that:

> (i) Prior to consummation of the Mtel spin-off, MCCA would make an equity contribution of $18.3 million to Mtel, the former MCCA subsidiary that was spun-off to MCCA shareholders on the date of the merger;
>
> (ii) Following final judicial approval of the settlement, MCCA will make an additional capital contribution to Mtel of $4.7 million; and
>
> (iii) Following final judicial approval of the settlement, BellSouth will deliver up to

---

8 On May 11, the non-settling plaintiffs were given the relevant documents, but again refused to participate in the settlement process.

> 222,854 shares of BellSouth common stock (subject to downward adjustment based on the number of MCCA shares, if any, that sought appraisal) to an exchange agent for distribution, pro rata, to those persons or entities who received shares of BellSouth common stock in the merger.[9]

The Stipulation of Settlement also provides that defendants will not object to an application for payment of fees and expenses by MCCA to settling plaintiffs' counsel, up to $995,000.

Subsequent events

Just prior to the Mtel spin-off, which occurred on April 4, 1989, BellSouth contributed the $18.3 million in cash to Mtel. The MCCA-BellSouth merger was also accomplished on that day.

---

[9] That stock had a market value at the time this settlement was submitted for approval of approximately $13 million.

On August 23, 1989, certain of the non-settling plaintiffs commenced a class action in the United States District Court for the District of Delaware. In addition to the breach of fiduciary claims asserted in this court, plaintiffs have alleged in the federal court claims under various provisions of both the Securities Act and the Securities Exchange Act and have asserted claims for treble damages under the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1962(a)-(d).

Approval by this court of the Stipulation of Settlement would entail the dismissal with prejudice of the claims asserted and the release of all other claims arising from the facts alleged. Although the federal court is, of course, free to determine whether the release in question would be given a

preclusive effect on the federal claims, see Kremer v. Chemical Constr. Corp., 456 U.S. 461, 481-83 (1982), I assume for purposes of analysis that approval of the Stipulation of Settlement's release of the federal claims would result in dismissal of the federal claims as well. See Nottingham Partners v. Trans-Lux Corp., C.A. No. 88-0591-2, 1990 U.S. Dist. LEXIS 8078 (D. Mass. June 27, 1990).

## II. The Legal Test

The law favors settlements, See Nottingham Partners v. Dana, Del. Supr., 564 A.2d 1089, 1102 (1989); Rome v. Archer, Del. Supr., 197 A.2d 49, 53 (1964), and this favor extends to class actions when the settlement represents a fair compromise.

A court's role in deciding whether to approve a proposed settlement

of a class or derivative action is to determine whether, considering all the circumstances, the proposed agreement represents fair and reasonable compensation for the claims to be released. It is not necessary or desirable to decide any of the issues of the suit on the merits. Polk v. Good, Del. Supr., 507 A.2d 531, 536 (1986). What is called for is a review of the record and an evaluation of the value of the claims given the evidence developed and the applicable law. The court must attempt to place itself in the position of the absent class members, and make a practical judgment considering all of the factors that would affect a litigant's decision to settle a claims: delay, risk, expense, value of settlement consideration, etc. Here, I conclude that based on such considerations the proposed settlement is

fair and reasonable to the class and will be approved, if modified in one particular described below.

## III. The Claims Sought to be Released

### 1. Plaintiffs' fiduciary duty claims relating to the language of the merger agreement

At the injunction stage, plaintiffs asserted that the MCCA directors' fiduciary duty to the MCCA shareholders required the board to terminate the Merger Agreement and that failure to do so constituted a breach of that duty. The directors' right to terminate the Merger Agreement, argued plaintiffs, could be found in Section 9.01(f)(i) of that agreement which states:

> Termination of the Merger Agreement
>
> The Merger Agreement may be terminated and the Merger abandoned at any time prior to the

> Effective Time, whether before or after the approval by the stockholders of [MCCA] . . . . (f) by [MCCA] if its Board of Directors in the exercise of its good faith judgment based upon the advice of counsel as to its fiduciary duties to the [MCCA] stockholders determines to (i) withdraw its recommendation that the MCCA stockholders approved the Merger Agreement or (ii) merge with, liquidate into or otherwise combine with any third party or enter into an agreement to do any of the foregoing; provided that, in either event, BellSouth shall have received $25 million in cash as a termination fee prior to such termination. (emphasis added)

It was my opinion at the time of the preliminary injunction application, and remains so now, that the right of termination created by Section 9.01 (f)(i) expired by its own terms once an affirmative shareholder vote on the merger occurred. Specifically, that subsection provides for termination of the agreement only through the board's

withdrawal of its recommendation of the merger to the company's shareholders (which recommendation is a necessary part of a merger vote, see 8 Del. C. § 251(b)). While it is permissible under Section 251(d) of the General Corporation Law for an agreement of merger to provide for the board to have the power to abandon a merger after the shareholders have approved it, this agreement contained no such provision. Section 9.01(f)(i) is much narrower. Its language is inconsistent with the board retaining power to abandon the transaction in the exercise of its unfettered judgment, after shareholder approval. The introductory language of Section 9.01 -- "before or after shareholders approval" -- does not create an ambiguity in my opinion; that phrase contemplates a number of contexts covered by subparagraphs (a) through (f) some

of which might occur after a shareholder vote. Subparagraph (f)(i) itself, however, is incapable of occurring after a shareholder vote. It is, in my opinion, unambiguous.

Even were plaintiffs' interpretation of Section 9.01(f)(i) correct, however, in order to establish that the MCCA board was entitled to terminate the merger agreement after shareholder approval of it, plaintiffs would have to prove that counsel advised the board that its fiduciary duty required the board to terminate the agreement. But indisputably the MCCA board was advised by its legal counsel that MCCA had no right under Section 9.01(f)(i) to terminate the agreement in the circumstances.[10] Thus,

---

10 Given the view of the law expressed above, it would be impossible to credit any suggestion that, in con-

(footnote continued on next page)

I conclude that this central claim is quite weak.

2. The disclosure claims under state and federal law

The settlement, if approved, would release all disclosure claims -- state or federal -- arising from this course of conduct, principally arising from the proxy statement. Under both federal and state theories, the principal point involves the asserted failure to explain the meaning or understanding of the meaning of Section 9.01(f).[11]

---

(footnote continued from previous page)

cluding that MCCA had no right to terminate the merger agreement under Section 9.01(f)(i), its legal counsel was in fact conspiring with the directors in a (hypothetical) desire to sell the company for less than the best achievable price.

11 Also possible are claims that defendants did not disclose that they

(footnote continued on next page)

The question on this theory then is whether the proxy materials failed to fairly convey the terms of the merger or whether they were misleading or inaccurate in any material respect concerning rights to terminate after the vote.

The proxy statement, in describing Section 9.01(f)(i) essentially paraphrases the Merger Agreement which itself is appended to the proxy statement. While paraphrasing the terms of an agreement may be insufficient to

---

(footnote continued from previous page)

were scheming to favor BellSouth, but those need not be treated as they are plainly the sort of confessional points consistently held to not state a claim. See, e.g., Edelman v. Salomon, 559 F. Supp. 1178 (D. Del. 1983); Seibert v. Harper & Row Publishers, Inc., Del. Ch., No. 6639, Berger, V. C. (Dec. 5, 1984); Weinberger v. United Financial Corp., Del. Ch., No. 5915, Hartnett, V.C. (1983).

satisfy disclosure obligations if the terms themselves are unclear or ambiguous, see Lafer Amster & Co. v. Stone Container Corp., 690 F. Supp. 1356 (S.D.N.Y. 1988), I do not read Section 9.01(f)(i) or any paraphrasing thereof in the proxy statement as ambiguous. That provision is not misleading, in my mind, because I cannot imagine any reasonable interpretation that would lead one to conclude that the MCCA board could terminate the agreement by withdrawing its recommendation to the stockholders after the stockholders have already voted to approve the merger agreement. The common and accepted meaning of the term recommend is "to present as worthy of acceptance. . . ." Webster's Ninth New Collegiate Dictionary (1988). It is contrary to that common meaning of the word to conclude that a "recommendation"

may effectively be "withdrawn" after the recommendation has been acted upon.

This construction is buttressed by the proxy statement's description of how such a "withdrawal" of the "recommendation" would work: MCCA would notify BellSouth that it was obliged to withdraw its recommendation that the Merger be approved by the MCCA stockholders and to cease soliciting proxies to approve the Merger Agreement." Thus, the proxy statement itself directly linked termination by "withdrawal of recommendation" to the proxy solicitation period, that is, the period prior to stockholders' approval.

The lack of ambiguity in this proxy statement is precisely what differentiates this case from Lafer Amster, cited above. Although denying summary judgment where there was an apparently

ambiguous prospectus, that court indicated that it might be persuaded to do otherwise if it were later demonstrated that "only one commercially reasonable meaning [could] be described to the provision." Lafer Amster, 690 F. Supp. at 1360.

Furthermore, federal securities laws impose no duty to provide legal opinions with respect to the operation and effect of Section 9.01(f)(i). See Umbriac v. Kaiser, 467 F. Supp. 548 (D. Nev. 1979). This case is in some respects similar to Umbriac v. Kaiser. In that case, the court characterized as frivolous an allegation that a proxy statement was required to explain the legal distinction between "distribution" and "disposition." Id. at 552 n. 3. I cannot conclude that non-settling plaintiffs' argument that the

MCCA proxy statement was required to explain the legal distinction between "withdrawal of recommendation" and "termination" is any more meritorious. Accordingly, I do not regard the central disclosure claim as a strong one.

3. Claims arising from the merger negotiation process

Among the claims to be released (and thus appraised here) are claims that the process by which MCCA got itself into the merger agreement (which, of course, limited its options once the market for stock of companies in its industry appeared to rise substantially -- see p. 9, supra) itself involved wrongs to the shareholders. The principal theory here available to plaintiffs is some variant of a state fiduciary duty on sale of the

company theory. The alternative conceptualization offered by non-settling plaintiffs in their federal litigation is a criminal conspiracy (RICO) claim. Both theories must view the 1986 agreements (pp. 6-7, supra) and the 1988 "auction" as pretexts for an undisclosed effort to do a sweetheart deal.

(a) state theories At the preliminary injunction hearing the non-settling plaintiffs urged that in arranging the sale of MCCA to BellSouth, MCCA's directors violated their duties under Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., Del. Supr., 506 A.23d [sic] 173 (1986). This argument includes the assertion that the agreement between MCCA and BellSouth in 1986, as well as the no-shop and termination provisions of the Merger Agreement, improperly deterred any other bidder from offering to purchase

the company. Without delving into the merits of this claim very deeply, suffice it to say that the so-called Revlon claim seems also to be a very weak one. Nothing in the record suggests any bad faith or negligence by the MCCA board in approving the transactions between the company and BellSouth. See Barkan v. Amsted Industries, Inc., Del. Supr., 567 A.2d. 1279, 1286-87 (1989); Citron v. Fairchild Camera & Instrument Corp., Del. Ch., No. 6085, Allen, C. (May 19, 1988), aff'd, Del. Supr., 569 A.2d 53 (1988). Moreover, it is quite unlikely that one could be led to conclude that the MCCA board acted unreasonably in the circumstances of this series of agreements. See Mills Acquisition v. Macmillan, Inc., Del. Supr., 559 A.2d 1261, 1288 (1989). Indeed, I am impressed, as I was at the

preliminary injunction stage, by the apparent independence of the board with respect to this transaction. The substantial stockholdings in the company by the MCCA directors, most notably John Palmer, the founder of MCCA and its chairman and chief executive officer, created powerful economic (and psychological) incentives to get the best available deal in the sale of MCCA. The MCCA board had enormous incentive to maximize shareholder value and this incentive does not appear to have been materially offset by other economic interests, specifically the CEO's role as CEO of the Mtel spin-off. Thus, reviewing the evidence in the file and the strengths and weaknesses of the legal arguments available to each side, I conclude that plaintiffs here had a very weak case for breach of fiduciary duty.

(b) federal law theory

These same events are repackaged by non-settling plaintiffs in its later filed RICO case in the United States District Court. In my view, that claim is even weaker than the state breach of fiduciary claims. Indeed, I entertain doubts that it might not be frivolous or irresponsible, given the record discovery as of the August, 1989 filing of the District Court action, to characterize this series of business transactions between unrelated parties as a criminal conspiracy.

The RICO claims asserted by non-settling plaintiffs in their federal complaint allege that defendants conspired to sell MCCA to BellSouth at a price below its actual value in consideration of which the MCCA director defendants would receive employment benefits

in a control of Mtel. The objectors allege that this "conspiracy" began with the 1986 Stock Purchase Agreement and continued up to the merger, supported by acts of mail and wire "fraud."

These claims appear wholly insubstantial. First, RICO liability requires a finding of some criminal or fraudulent activity. See 18 U.S.C. § 1961 (1979). As indicated above, the record here suggests nothing illegal, criminal, or fraudulent about the 1986 Agreements, the option and voting rights granted in connection with the Merger Agreement, or the conduct of the directors in negotiating, approving and effectuating the Merger Agreement. Each of these acts appears to reflect valid business judgments. That leaves only the proxy statement as a potential source of criminality or fraud. I am unable to see

much likelihood that that document was misleading or fraudulent. But even assuming that the proxy statement were deceptive, that fact alone could not support a valid RICO claim. RICO requires a "pattern" of illegal activity defined by statute to mean "at least two acts of racketeering activity" within a ten year period. 18 U.S.C. § 1961(5). The United States Supreme Court has interpreted "pattern" to mean that a plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." H.J. Inc. v. Northwestern Bell Telephone Co., ___ U.S. ___, 109 S. Ct. 2893, 2900 (1989) (emphasis added);[12] see also

---

12 Objectors cite H.J. Inc. for the proposition that a "single scheme can support [a] pattern of racketeering activity." This may well be the case. However, this language

(footnote continued on next page)

Marshall-Silver Constr. Co. v. Mendel, 894 F.2d 593, 597 (3d Cir. 1990). (Since "Congress was concerned in RICO with long-term criminal conduct," "pattern" requires "threat of repetition of criminal conduct in the future"). In this

---

(footnote continued from previous page)

must be read in light of the qualifying "continued threat" language -- that is a single scheme can support racketeering charges only if there is some continued threat of criminal conduct. Moreover, the use of the term "scheme" is to be distinguished from the term "predicate" as used in the Supreme Court's opinion in H.J. Inc. The Supreme Court held that in enacting the RICO statute Congress "envision[ed] a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related to and that amounted to, or threatened the likelihood of, continued criminal activity." 109 S. Ct. at 2899. While a single scheme may be sufficient, this language makes clear that multiple predicates are required. In this case, if the proxy statement is in fact fraudulent, which, again, I do not believe to be the case, it would be but one predicate act.

case, I am wholly unpersuaded that any such threat exists.

Moreover, in order to establish any violation of the mail and wire fraud provisions of RICO, objecting plaintiffs must demonstrate that defendants (most importantly Mr. Palmer, who was deposed twice) acted with specific intent to defraud or made material misstatements with reckless disregard of truth or falsity of those statements. See In re Phillips Petroleum Securities Litig., 881 F.2d 1236, 1249 (3d Cir. 1989).

***

In sum, I continue of the view that plaintiffs' have been driven by the fact that the market value of BellSouth cellular phone assets appeared to change very significantly between the date of the signing of the merger agreement and

the closing of the merger. Understandably they want to capture some or all of that increase for themselves. But the corporation's contract did not give the board a broad "fiduciary out." I find no plausible evidence that this lack itself resulted from any wrong (scheme or innocent dereliction). Thus I see the cases principally as an attempt by shareholders to be excused from the market consequences of a legitimate contract that allocated risk. I do not see these cases as legally strong.

## IV. Non-Settling Plaintiffs' Objections

The non-settling plaintiffs assert that the consideration offered in exchange for release of all MCCA shareholders claims is inadequate and cannot be approved as fair. In support of this

view they assert that (1) the settling plaintiffs had inadequate information about the merits of the claims proposed, to be released when they recommended approval of the settlement to the court and that they are actually motivated not to maximize class interests but to earn a handsome fee for the attorneys who represent them; (2) the consideration offered is inadequate in light of the huge damage claims they say might be proven; (3) the consideration is less than settling plaintiffs claim because (a) the $18.3 million cash payment to Mtel at the time of the spin-off cannot be counted as consideration for the release of claims because it would have been paid in all events; because it has already now been paid and is thus not contingent upon approval of the settlement; and because it is a payment to Mtel and not directly to

class; (b) similarly, the $4.7 million payment to Mtel that is contingent on approval of the proposed settlement is to be made to Mtel and not to the class directly; and (c) the payment of 222,854 shares of BellSouth stock directly to the class is a payment that the directors could have secured without the settlement agreement and thus cannot be considered as consideration for the release of class claims. Non-settling plaintiffs also insist that they be afforded a right to opt-out of any settlement that may be approved and urge that, in all events, it is inappropriate in these actions to release their claims against the same defendants pending in the Unites [sic] States District Court.

1. The claim of bad faith or bad judgment

Objectors mainly contend that their claims have not been sufficiently investigated. From this base they sling two shots. First, they assert that only parties uninterested in the welfare of the class, and interested only in the welfare of the settling plaintiffs' lawyers, could have concluded to settle such large claims at so preliminary a stage. Second, aside from motivation, they say that neither counsel nor the court is in a position to responsibly assess the strengths and weaknesses of the claims and thus it would be imprudent to approve this settlement. I reject both claims. I find no basis to infer inappropriate, selfish motivation nor do I believe that the claims are so little developed that

counsel and the court may not responsibly act at this stage.

Stockholder class actions are not infrequently attacked as too easily susceptible to abuse for the benefit of the lawyers who, in many instances, instigate and control them. Threats come from two opposite directions. First, valid or strong claims may be settled too cheaply as part of an implied bargain with defendants that assures plaintiffs' counsel that there will be no opposition to payment of a generous fee. The other threat of abuse threatens not class members but defendants. Weak or insubstantial claims, that are nonetheless not dismissible, may present an occasion in which a rational defendant (particularly one who is infrequently sued) may pay some settlement ransom (less than the expected cost of legally establishing its

non-liability) in order to conclude the matter.

The purpose of Rule 23(e) and the hearing it contemplates is to create some protection against the first of these risks.[13] That protection is, of

---

13 The second risk -- exploitation of defendants -- is not addressed formally in the law governing settlement of class action. Defendants in such suits are not situated differently than are other defendants with respect to this risk, except that the possibility of shifting the plaintiffs' attorneys' fees to the defendant probably increases the risk that attempts to exploit defendants will occur in that context. I suspect that some felt need to offer some protection to class action defendants from this risk accounts in part for the willingness of courts in practice to depart from the pure theory of notice pleading that the drafters of the Federal Rules of Civil Procedure had in mind and to assert in some instances, that a plaintiff must allege specific facts and not simply conclusions. See, e.g., Grobow v. Perot, Del. Supr., 539 A.2d 180, 187 (1988). Compare Charles Alan Wright, Law of Federal Courts, § 68 at p. 285-87 (2d ed. 1970).

course, imperfect. The reaching of a settlement, whether in the context of a class action or not, involves a range of professional judgments, all of which will necessarily be made on imperfect information.

The question whether one knows enough about the merits of one's claim to responsibly consider and act on a proposed settlement is logically the first of these judgments.

The decision of the settling plaintiffs and their counsel to pursue negotiations at an early stage in these proceedings and to recommend that settlement to the court after certain discovery is questioned by the non-settling plaintiffs, but I can, in no event, see in what respect the course of the conduct of this litigation or the terms of the proposed settlement can legitimately support

an inference that the settling plaintiffs and their attorneys were not proceeding in utter good faith. There doubtless are cases in which counsel's interest in earning a fee seems to have motivated a proposed settlement. In such instances this court has rejected the proposal. See Stepak v. Tracinda Corp., Del. Ch., No. 8457, Allen, C. (Aug. 18, 1989).

Here, in my opinion, the early stage at which negotiations occurred, far from supporting the sinister inference for which the non-settling parties contend, is readily explainable on sensible and proper grounds: plaintiffs had just been on the losing end of what could easily have been interpreted as a devastating denial of their injunction application. In denying the relief sought, the

court used strong language directed towards plaintiffs' central theories. Matters remained to be discovered, of course, relating to the theory that the directors had not sought in good faith to maximize corporate interests in entering in to the merger agreement.[14] But the fact that more discovery remains to be done will always be true, unless of course the plaintiff is fully ready for trial. Moreover, settling plaintiffs had to face the following: (1) this was not an MBO transaction; (2) the company's founder had negotiated the transaction and all shareholders were treated equally; (3) the fact that Mtel was spun-off

---

14 Nonetheless the discovery taken in this case has been substantial. Plaintiffs took at least eight depositions before the preliminary injunction hearing. After the preliminary injunction stage, three more depositions were taken.

was explicable on good business grounds; (4) in the circumstances, a court was unlikely to view the fact that the CEO was going to continue to manage the Mtel business as a very significant conflict; and (5) whatever leverage they had to get something through settlement would never be greater than it was before the transaction closed. The inherent uncertainty that time entails meant BellSouth wanted to close as soon as all its conditions were satisfied and it would, no doubt, prefer to have reached a general settlement by closing (but could close without it).

Thus, there are good reasons for an early settlement agreement in this instance. The non-settling plaintiffs effort to make this substantial settlement reached at an early time seem to be

a pretext for a side payment of a legal fee, in my opinion, fails utterly.

2. The claim that the proposed consideration is inadequate

The proposed settlement contemplates payments by BellSouth in the range of $35 million in exchange for the release of all claims of any kind that arise from the series of actions attached. Recognizing that objectors claim that their potential damages (calculated by reference to what they say might have been achieved in a market transaction that was negotiated in April 1989) was on the order of $800 million and that under the RICO statute a treble damage award is available, I conclude that the proposal does constitute more than adequate compensation for the release sought.

In so concluding, I reject objectors' contention that, since the $18.3 cash payment to Mtel has already been paid, it cannot be weighed as consideration for a release of claims now. While parties who effectuate part or all of a settlement of a class action before court approval do risk a loss if the court should find the consideration contemplated by the settlement inadequate, there is no rule that absolutely requires that such payments await court approval. Compare Barkan v. Amsted Industries, Del. Supr., 567 A.2d 1279, 1284-85 (1989) with Chickering v. Giles, Del. Ch., 270 A.2d 373, 375 (1970). Here, there appears sufficient reason to have proceeded with the payment.

I also reject the argument that the $18.3 million payment was in fact not paid in consideration of the settlement

but was a payment that would have been made in all events. The record does not support that contention. Rather, it is more consistent with BellSouth's assertion that the $18.3 payment had never been agreed to prior to the settlement negotiations and that BellSouth agreed to the payment only in consideration of the termination of this litigation and the release of all claims.

Finally, I reject the notion that payment of this sum to Mtel rather than directly to the individual stockholders cannot count as consideration of those stockholders for purposes of release of claims. The payment to Mtel was made on the same day that the Mtel stock was spun-off to the MCCA shareholders. Thus, the benefit was indirectly realized

by MCCA shareholders in the same proportion as their MCCA stock ownership. Objectors say that some class members must have sold their Mtel stock on the when-issued market prior to the spin-off, and if they did, those shareholders would not benefit from this part of the proposed consideration for the release of claims. This is correct. The record, however, provides no way in which to evaluate how many of the MCCA shareholders did sell their Mtel stock prior to the spin-off. Indeed, I am not sure how that could be established since the number of shares traded in the when-issued market would not itself represent the number of MCCA spin-off shares sold: there are no doubt short-sellers in that market and even as to MCCA shareholders who sold rights in the when-issued markets, those rights could be resold one or more times.

Another factor that is pertinent to an evaluation of the importance of possible sales in a when-issued market is the possible injustice to defendants. Imagine (as I decide is, in fact, the case) that the package of cash and securities proposed does represent adequate and fair consideration for the release of claims. To now reject that settlement because some uncertain number of MCCA shares may have sold their rights to Mtel stock in the when-issued market before the spin-off would (a) give to all other former MCCA shareholders an unfair windfall and (b) at the same time deprive them of the remaining consideration offered in this settlement.

The court's obligation on this motion is to evaluate the overall fairness of the proposal. Having concluded that the consideration offered is quite

fair, I cannot conclude that the possibility that some members of the class may not participate in all elements of the consideration fully because they sold their rights to Mtel stock disqualifies the proposed settlement from approval.

Objectors' argument has greater force when applied to the second element of the proposed consideration: the further $4.7 million cash infusion to Mtel. That payment is to be made only after court approval. In this instance, we do not deal with the relatively small when-issued market, but rather with many months of trading in the market for Mtel stock itself. Any member of the class who sold during this lengthy period will

receive no direct benefit from this payment,[15] and any person who bought will benefit. There is no reason why this indirect form of compensation, with its obvious disadvantages, is necessary. It is plainly superior to compensate members of the class directly for the release of personal claims. Thus, with respect to this payment, I will require, as a condition of court approval, that this payment be made to class members directly rather then to Mtel.[16]

---

15 In reply to an argument that selling Mtel shareholders have already received this benefit in that their selling price reflected the prospect for this (contingent) future payment, one must say that the existence, in fact, of any such benefit or its amount was at the time of any such sale of stock so speculative as to form no basis for responsible judicial action.

16 I recognize that Mtel might make profitable use of this cash infusion. But that fact does not jus-

(footnote continued on next page)

Finally, the objectors criticize the $13 million increase in the BellSouth stock to be paid to MCCA stockholders at the time of the merger. They argue that such an increase would have been paid pursuant to the Merger Agreement if the transaction had closed after April 10. The merger actually closed on April 4. Non-settling plaintiffs suggest that the MCCA board could have and should have delayed the closing of the merger, despite provisions in the merger agreement requiring prompt closing upon the fulfillment of all conditions precedent to the merger, until after April 10 in order to cause this "bump-up" provision

---

(footnote continued from previous page)

> tify, in these circumstances, an enforced investment by the class where the incongruence between class members and stockholders is as significant as doubtless is here.

to be triggered. Non-settling plaintiffs do not offer a suggestion as to how such a delay could be accomplished without violating MCCA's contractual obligation of good faith and fair dealing. Indeed, these parties appear to suggest that the board could have achieved this benefit under the merger agreement by pretextual delays of closing. There obviously is no legal right to engage in such conduct, and this court can hardly discount (as I think I have been invited to do) the increased consideration to be received, on the basis that sharp practices might have achieved that same benefit.

That point aside, however, the objectors' argument ignores the purpose of setting the trigger date for the "bump-up" provision at April 10. The record date for receipt of the BellSouth quarterly dividend was April 10. Thus,

if the merger was accomplished by April 10 the (former) MCCA shareholders would receive that dividend. If it was not the merger agreement provided for the "bump-up" in price equal to the amount of the dividend. Thus, under the merger agreement the MCCA shareholders were to receive either the bump-up or the dividend, but not both. Under the Stipulation of Settlement, the stockholders received both the bump-up and the BellSouth dividend. Thus, the $13 million bump-up does unquestionably represent additional value received in the settlement.

Accordingly, I reject most of objectors' arguments designed to reduce the apparent value of the consideration offered in the proposed settlement. I conclude that that consideration has a

value to the class in excess of $34 million and is more than adequate compensation for the release of the state and federal claims (which, in most particulars, are essentially similar).

3. Objectors' position re: certification under Rule 23(b)

The objectors assert that this action must, or in all events should, be certified under paragraph (b)(3) of Rule 23 and that therefore each shareholder must be afforded a right to opt-out of the settlement and litigate their individual claims. Settling plaintiff and defendants assert the action is correctly certified under Rule 23(b)(1) and (2), as it provisionally has been.

Questions of this sort not infrequently come before our courts. See, e.g., Nottingham Partners v. Dana, Del.

Supr., 564 A.2d 1089 (1989); Raskin v Birmingham Steel Corporation, Del. Ch., No. 11365, Allen, C. (Dec. 4, 1990). Typically an action challenging the propriety of director action in connection with a merger transaction is certified as a (b)(1) or (b)(2) class because plaintiff seeks equitable relief (injunction); because all members of the stockholder class are situated precisely similarly with respect to every issue of liability and damages[17] (compare Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)); and because to litigate the matters separately would subject the defendant to the

---

17 That is, if it comes to a damage calculation the measure will be a pro-rata portion of some figure that measures an "entirely fair price" that should have been paid or a market price that should have been achieved.

risk of different standards of conduct with respect to the same action.

The argument has been made that once a preliminary injunction is denied a (b)(2) action should be treated as a (b)(3) action because, practically speaking, damages are the likely remedy if plaintiff prevails. This argument has been rejected, in part, I suggest, because of concerns reflected in the second and third of the reasons stated above. See In re Amsted Industries, Inc., Litig., Del. Ch., No. 8224, Allen, C. (Nov. 3, 1986), aff'd, sub nom., Barkan v Amsted Industries, Del. Supr., 567 A.2d 1279 (1989); Shreiber v. Hudson Petroleum Corp., Del. Ch., No. 8513, Hartnett, V. C. (Oct. 29, 1986). Objectors would revisit this question. They assert that this action is essentially legal, seeking money damages. Thus, they

implicitly invoke the statement of the United States Supreme Court in Shutts, supra, that an opt-out right is constitutionally necessary where a court attempts to bind absent members[18] to a judgment concluding claims "wholly or predominately for money judgments." 472 U.S. at 811 n.3.

In addressing whether non-settling plaintiffs or absent class members must necessarily be afforded an opt-out right, one must consider not only the nature of the claims stated but also the nature of the claims to be released (here, including federal securities laws

---

18 Since the objectors are the non-settling plaintiffs, they are plainly before the court, having consented to this court's jurisdiction by filing suit here, and thus, the strict holding of Shutts, has no direct application here with respect to them.

and RICO claims). See Raskin v. Birmingham Steel Corp., supra, at p. 34.

That the state law claims requires no opt-out right is established by Nottingham Partners and cases cited therein. With respect to the federal claims, I am also satisfied that they do not fall with Rule 23(b)(3) definition. The federal securities claims are most importantly claims of proxy violation. Such claims, if proven, will support the granting of equitable relief. See Mills v. Electric Auto-Lite Co., 396 U.S. 375, 386-88, 90 S. Ct. 616 (1970); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 391 (2d Cir.), cert. denied, 414 U.S. 910 (1973); Bertoglio v. Texas International Co., 472 F. Supp. 1017, 1021 (D. Del. 1979); In re Ceasars Palace Shareholders Litig., 360 F. Supp. 366, 392 (S.D.N.Y. 1973).

Thus, the federal claims as well as the state claims subject the defendants to threats of "inconsistent . . . adjudications . . . which would establish incompatible standards of conduct . . . " (Rule 23(b)(1)(A)) and, in both federal and state actions defendants have "acted . . . on grounds generally applicable to the class," making final equitable relief with respect to the whole class appropriate (Rule 23 (b)(2)). This is not surprising; the federal and state claims are essentially slightly modified legal theories applied to the same "wrongs." Neither the state nor the federal claims are class actions of the type that meld somewhat dissimilar individual claims together for efficient common adjudication, as contemplated by subsection (b)(3). Rather both sets of theories involve one set of actions by

defendants creating a uniform type of impact upon the class of stockholders. The Constitution does not require (cf. Hansberry v. Lee, 311 U.S. 32 (1940)), nor do prudential considerations, in my opinion, commend the granting of an opt-out right in stockholder actions attacking the propriety of director conduct in connection with a corporate merger. The propriety of director action should be adjudicated, if it is to be adjudicated, once with respect to all similarly situated shareholders.

4. Scope of the release

Non-settling plaintiffs assert that it would be inappropriate for this court to authorize the release of federal RICO and federal securities law claims, especially so with respect to Exchange Act claims which this court could not

adjudicate. I will not revisit this subject now. See, e.g., Nottingham Partners v. Dana, Del. Supr., 564 A.2d 1089 (1989); see also TBK Partners Ltd. v. Western Union Corp., 675 F.2d 456 (2d Cir. 1982); Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981); Abramson v. Pennwood Investment Corp., 392 F.2d 759 (2d Cir. 1968).

These cases and others establish that while a federal court in which a released claim is pending or is brought always remain free to adjudicate the effect of the release, it is within the in personam jurisdiction of a state court, in an appropriate case, to authorize the release of all claims, including exclusively federal claims. The efficient operation of our coordinated federal system requires such a result. What

is essential is that the state court consider the value of the federal claims in determining that fair consideration for their release is proposed. I have tried to do so here. Those claims seem very similar to the state claims and subject to the same evaluation.

V. Attorneys' Fees

Finally, I add a note on the application of settling plaintiffs' for the award of an attorney's fee of $995,000, which is unopposed by defendants. Our law on this subject is well developed. See, e.g., Allied Artists Pictures Corp. v. Baron, Del. Supr. 413 A.2d 876 (1980); In re Anderson, Clayton & Co. Shareholders Litig., Del. Ch., No. 8387, Allen, C. (Apr. 14, 1988).

The application will be approved. The monetary benefit here

achieved was substantial. Settling plaintiffs' lawyers are experienced with litigation of this kind and here made competent and knowledgeable judgments to achieve a beneficial result. They were aided in this by circumstances but knew enough to move quickly to achieve such advantage as the uncertainty of circumstances created. The application is wholly reasonable considering the benefit achieved, the time expended, the contingent nature of the undertaking, etc.

***

The parties supporting the settlement should advise whether the adjustment to the $4.7 million cash payment called for the Stipulation of Settlement is acceptable to all signatories. In the event that it is, the settlement as thus modified will be approved as fair and reasonable to the class and the granting

of the broad release negotiated will be approved.

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

| | | |
|---|---|---|
| IN RE MOBILE COM- | ) | Civil Action |
| MUNICATIONS CORPO- | ) | Nos. 10627, |
| RATION OF AMERICA, | ) | 10638, 10644, |
| INC., CONSOLIDATED | ) | 10656, 10697 |
| LITIGATION | ) | |

ORDER AND FINAL JUDGMENT

On this 6th day of February, 1991, a hearing having been held before this Court to determine whether the terms of the Stipulation and Agreement of Compromise and Settlement, dated June 6, 1989 (the "Stipulation"), and the terms and conditions of the settlement proposed in the Stipulation (the "Settlement"), and all transactions referred to therein or preparatory or incident thereto, and

all such transactions taken as a whole, are fair, reasonable and adequate for the settlement, compromise and discharge of the Settled Claims, as described in the Stipulation; and whether judgment should be entered in the above-referenced Civil Actions No. 10638, 10644, 10656 and 10697 (the "Shareholder Actions") dismissing the Shareholder Actions on the merits with prejudice as against the plaintiffs and all holders of Class A or Class B Common Stock of defendant Mobile Communications Corporation of America ("MCCA") as of the close of business on July 20, 1988 and their successors in interest or transferees, immediate and remote; and whether judgment should be entered in the above-referenced Civil Action No. 10627 (the "BellSouth Action") dismissing the BellSouth Action as moot; the Court having considered all matters

submitted to it in the Actions at the hearing and otherwise; the Court having rendered its decision of January 4, 1991, as revised January 7, 1991 (the "Opinion"); and it appearing that a notice of the hearing substantially in the form approved by the Court was mailed to each shareholder of Class A and B Common Stock of MCCA appearing on the stock books or records of the Transfer Agent as of the close of business on July 20, 1988 until and including April 4, 1989, as shown by the stock books or records of the Transfer Agent at the respective addresses set forth in such records; and that MCCA has used reasonable efforts to give notice to all beneficial owners of such securities.

NOW, THEREFORE, IN ACCORDANCE WITH THE OPINION AS SUPPLEMENTED IN PARAGRAPH 2 HEREOF, IT IS HEREBY ORDERED that:

VI. The Class provisionally certified in this Court's Order dated October 7, 1989 is hereby permanently certified pursuant to Rules 23(b)(1) and 23(b)(2) of the Court of Chancery Rules. Plaintiffs Monahan and Wolf are designated as representatives of the Class, pursuant to the Stipulation.

VII. The Stipulation and Settlement and all transactions referred to therein or preparatory or incident thereto, and all such transactions taken as a whole, are approved as fair, reasonable and adequate, and the parties are directed to consummate the Settlement in accordance with the terms and provisions of the Stipulation; provided, however, that in lieu of the proposed $4,700,000 contribution to the capital of Mobile Telecommunications Technology Corporation ("Mtel") by MCCA, BellSouth shall

distribute said sum in the form of BellSouth Common Stock in accordance with the existing terms and provisions set forth in paragraph 2 of the Stipulation for the distribution of BellSouth Common Stock, with the additional provision that the Exchange Agent shall make only one distribution in accordance with the terms and provisions of the Stipulation and not two separate distributions. For purposes of determining the number of shares of BellSouth Common Stock to be distributed in lieu of the proposed $4,700,000 capital contribution by MCCA to Mtel, the value of BellSouth Common Stock is determined to be that value equal to the average of the New York Stock Exchange Composite closing prices of BellSouth Common Stock for the ten trading days prior to the date this Settlement becomes final under the terms of the Stipulation.

VIII. The Shareholder Actions (including complaints and counterclaims) are hereby dismissed on the merits as to all defendants and with prejudice as against plaintiffs in the Shareholder Actions and all members of the certified class, without costs except as provided in the Stipulation, such dismissal being subject only to compliance by the parties with the terms and conditions of the Stipulation and any Order of this Court with reference to the Stipulation. The obligations under the Stipulation as modified in paragraph 2 hereof shall be in full settlement, compromise, release and discharge of the Settled Claims, and no Released Party, as defined in the Stipulation, shall have any other or further liability or obligations to anyone with respect to the Settled Claims except as expressly provided in the

Stipulation as modified in paragraph 2 hereof.

IX. The attorneys for plaintiffs Marshall Wolf and Regina T. Monahan are hereby awarded the sum of $995,000 in fees inclusive of disbursements, which sum the Court finds to be fair and reasonable and which shall be paid to said attorneys by MCCA from its own funds and without contribution or reimbursement from BellSouth in accordance with the Stipulation. As provided in Paragraph 8 of the Stipulation, interest shall accrue on said sum at the rate of 10% per annum from the date of entry of this Order and Final Judgment until the date of payment by MCCA.

X. Jurisdiction is hereby reserved over all matters relating to the administration and consummation of the

terms of the Stipulation and the payment of attorneys' fees and expenses.

XI. The BellSouth Action (including complaints and counterclaims) is hereby dismissed as moot.

/s/ William T. Allen
Chancellor

CONSENTED TO:

MORRIS, ROSENTHAL, MONHAIT
& GROSS, P.A.

By: _____

First Federal Plaza
P.O. Box 1070
Wilmington, Delaware 19899

On Behalf of the Class

RICHARDS, LAYTON & FINGER

By: _____

One Rodney Square
P.O. Box 551
Wilmington, Delaware 19899

On Behalf of Defendants
Mobile Telecommunications
Technologies Corp.,
Salvatore J. Albano,
Xavier W. Nady,
John N. Palmer,
Thomas E. Barksdale,
R. Fraser Triplett,
E. Lee Walker, and
C. Victor Raiser II

MORRIS, NICHOLS, ARSHT & TUNNEL

By: _____

P.O. Box 1347
1105 N. Market Street
Wilmington, Delaware 19899

On Behalf of Defendants
BellSouth Corporation and
Mobile Communications
Corporation of America

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| IN RE MOBILE COMMUNICATIONS CORPORATION OF AMERICA, INC. CONSOLIDATED LITIGATION | § | No. 69, 1991 |
| | § | Court Below: Court of Chancery of the State of Delaware in and for New Castle County C.A. Nos. 10627, 10638, 10644, 10656, and 10697 |

Submitted: October 16, 1991
Decided: February 4, 1992

Before CHRISTIE, Chief Justice, HORSEY and WALSH, Justices.

O R D E R

This 4th day of February, 1992, the Court having considered the

briefs of the parties and their contentions at oral argument, and having concluded that the judgment of the Court of Chancery should be affirmed on the basis of and for the reasons stated by the Court of Chancery in its well-reasoned Memorandum Opinion dated January 7, 1991 and Order and Final Judgment dated February 6th, 1991;

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery be, and the same hereby is, AFFIRMED.

BY THE COURT:

/s/ Henry R. Horsey
Justice

IN THE COURT OF CHANCERY
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

| | | |
|---|---|---|
| IN RE MOBILE COM-<br>MUNICATIONS CORPO-<br>RATION CONSOLIDATED<br>LITIGATION | )<br>)<br>)<br>) | Consolidated<br>Civil Action<br>No. 10627 |

MEMORANDUM AND ORDER
DENYING MOTION
FOR PRELIMINARY INJUNCTION

Certain plaintiffs, shareholders of Mobile Communications Corporation of America ("MCCA"), having moved in these consolidated actions for an order preliminarily enjoining the closing of the transactions contemplated by that certain Agreement and Plan of Reorganization (the "Agreement") among MCCA, COM/NAV Marine, Inc. (now Mtel, Inc.), BellSouth Corporation and BLS

Acquisition Corp. I, Inc. dated as of February 19, 1988; and

The court having considered the pleadings, depositions and affidavits filed in the matter together with the briefs and oral arguments of the parties.

It is hereby ORDERED, this 29th day of March, 1989, for the reasons set forth below, that such motion is denied.

1. The legal test applied on this application requires a discretionary judgment that considers the likelihood that the claims asserted will ultimately be sustained, the probability and extent of injury that it is claimed will befall plaintiffs prior to final hearing, the ability of the court to fashion an adequate compensatory award or equitable relief following trial, and any harm that may befall defendants or the public as a result of granting the relief and that

may not adequately be protected against by bond or otherwise. See, e.g., Ivanhoe Partners v. Newmont Mining, Del. Supr., 535 A.2d 1334 (1987). The basis of this decision is the conclusion that plaintiffs have demonstrated an insufficient likelihood of ultimate success on their claims to justify the preliminary relief they seek.

2. This case, as refined by the presentation of counsel at oral argument, presents at this stage principally a question of the adequacy of the disclosure made in the joint solicitation of proxies in connection with the MCCA shareholder approval of the Agreement. The test for the adequacy of such disclosure has generally been established in this State by Rosenblatt v. Getty Oil Co., Del. Supr., 493 A.2d 929 (1985).

3. I thus pass over any claim of negligence that plaintiffs at one point seemed to advance. As to the good faith or motive of the board of MCCA, in connection with the negotiation of the Agreement, I note that the board appears completely independent with respect to this transaction and indeed appears very powerfully to have predominating economic interests in the transaction as shareholders of MCCA that are not materially offset by other economic interests. It is, however, the case that the independence (or good faith or due care) of a board is not directly relevant to a determination whether a disclosure obligation has been satisfied (disclosure not being a question of business judgment, see, e.g., Anderson Clayton Shareholders' Litigation, Del. Ch., 519 A.2d 669, 675 (1986)).

4. The disclosure charged here as being inadequate or misleading does not relate to a fact concerning the business or value of MCCA or of any other party to the Agreement. Nor does it relate to any of the economic terms of the transaction contemplated by the Agreement. It does relate to the provision of the Agreement governing the rights of the parties to termination - under certain circumstances (Section 9.01).

5. The full Agreement was appended to the proxy solicitation materials. Those materials summarized the terms of the termination clause in several places. See pp. 6, 18 (with respect to the related ¶ 6 provision) and pp. 19-20. I conclude, on the preliminary basis a motion of this sort

permits, that the defendants' interpretation of the scope and meaning of Section 9.01(f)(1) is likely to be sustained and that none of the disclosures made to shareholders reflect an inaccurate statement concerning the scope or meaning of that provision. Moreover, I conclude that the MCCA board has (or at least appears on the limited record now available to have) satisfied any obligation it may be thought to have, with respect to this matter, to give a fair summary of the particulars of the merger transaction.

6. The language of Rosenblatt v. Getty Oil, supra or that of the other cases defining the board's disclosure obligation, does not apply perfectly when the claimed "omitted fact," Rosenblatt 493 A.2d at 944, is not a fact concerning the business of the Company, but is actually a legal conclusion concerning the

scope or meaning or effect of a negotiated provision in the merger agreement. Passing over this consideration, however, it is noted that plaintiffs claim that there is an "omitted fact." It is said to be either (a) the "fact" that the right of the MCCA board under Section 9.01(f)(1) of the Agreement to withdraw its recommendation of approval to shareholders became moot after, or did not survive, the shareholder vote itself, or (b) the fact that all of the signatories to the Agreement so construed Section 9.01(f). With respect to the first characterization of the "omitted fact," I note that if the legal conclusion is sound (i.e., MCCA does under the contract language lose the ability to "withdraw," etc. or the power to withdraw becomes legally moot after the stockholder vote approving the merger),

which I am inclined to believe, it cannot be concluded that this condition, or conclusion or fact is "omitted" from the proxy materials. The text of the provision was provided; the summaries are not inaccurate even if they are (at p. 6, but not pp. 19-20) very summary. With respect to the second characterization -- the notion that the parties had a secret (i.e., undisclosed) "agreement" of the kind asserted -- such a fact can hardly be thought in the least surprising to one who, upon reading the provision, shares that legal conclusion. Indeed, plaintiffs' argument at this point seems to come down to the claim that the parties ought to have disclosed that they each thought that the Agreement provides, with respect to termination rights, what the Agreement does appear to provide.

7. More sympathetically, plaintiffs may be thought to urge that a more expansive explanation of just how the termination clause might work before and after the stockholder vote was necessary in order for the board of MCCA to meet its obligation to the Company's shareholders who are not, this argument assumes, legally sophisticated. For purposes of this motion, I have not been persuaded that it is the case that a more accessible explanation was required by the directors' fiduciary duty. To hold otherwise would, I suppose, be an extension of Delaware law. I do not , at least in the context of this case, perceive such an extension as, on balance, helpful. Surely a legal rule that might cause shareholder votes to be better informed with respect to the scope and meaning of the non-economic terms of

complex legal documents would, if it were otherwise costless, be a desirable rule. But how could such a requirement be articulated and what uncertainties would it create? Such a further requirement would come with substantial costs. Once a director's duty was held to extend beyond disclosing all material "facts" in the board's possession and beyond fairly explaining the material terms of the transaction in a technically correct way (as it appears was done here), one could never, before the fact, know with reasonable certainty just how accessible the explanation of complex legal transactions would have to be made. Proxy solicitations would grow ever more voluminous and, probably, less, not more, helpful.

8. Perhaps some shareholders believed when they voted to approve the Agreement that a broad "fiduciary out"

clause -- as broad as the first sentence of Section 251(d) of our corporation law statute -- was included in the termination clause negotiated. If they did, I am inclined to believe they made a mistake of law. I cannot conclude that the disclosure actually made led them to any such (assumed) mistake of law or, indeed, contributed to it in any way.

9. The disclosure here is altogether different from that treated in Anderson Clayton Shareholders' Litigation, Del. Ch., 519 A.2d 669 (1986), the case principally relied upon by plaintiffs. There, the board made statements to the shareholders -- either representations or untrue statements of present intent -- that would have been critical to a reasonable shareholder in those circumstances. See 519 A.2d at 677. Those statements appeared, at the

time of the preliminary injunction application, to have either been false when made or deliberately not complied with by the board. Here, I cannot conclude that the disclosure with respect to the termination clause is incorrect (or false) in any material respect and, thus, I do not understand that authority as having any direct bearing upon this situation.

/s/ William T. Allen
Chancellor